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No. .....

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In The

Supreme Court of the United States

October Term, 1984

—o—

WAYNE CRYTS, *et al.*,

Petitioners,

vs.

ROBERT P. LINDSEY, Trustee,

Respondent,

and

THE UNITED STATES OF AMERICA,

Intervenor-Respondent.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

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A

QUESTIONS PRESENTED FOR REVIEW

1. Given the alignment of the opinions expressed by the Justices of this Court in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), was the grant of jurisdiction to district courts and bankruptcy courts under the 1978 Bankruptcy Reform Act held to be unconstitutional in its entirety, or is the exercise of some separable portion of this jurisdiction still constitutionally permissible?

2. If this Court's holding in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), is in some way limited to certain portions of the bankruptcy jurisdiction granted to district courts and bankruptcy courts by the 1978 Bankruptcy Reform Act, is that portion of the Court's opinion relating to the prospective only application of its judgment limited to the holding of the Court, or does the prospective application, which implies retroactive validity, apply to preclude challenges to past judicial actions of a kind to which the *Marathon* holding does not apply?

3. Is the power of bankruptcy courts, under the 1978 Bankruptcy Reform Act, to issue judgments and orders of contempt limited by Bankruptcy Rule 920, which governed the contempt power of bankruptcy referees prior to 1978?

4. Did the Court of Appeals err in instructing the District Court to review a decision of a bankruptcy judge using a "clearly erroneous" standard of review, when such

a standard has been held to violate the requirements of Article III of the Constitution?

5. When a grain storage facility was in chapter 11 bankruptcy, and numerous farmers/depositors were seeking to remove their grain from storage, did the bankruptcy court have jurisdiction to order the sale of this grain given the conflicting claims against it, the requirements of 11 USC § 363(f), and the holding of two superior courts that bankruptcy jurisdiction was "preliminary" and for the purpose of resolving competing claims of ownership only?

B

LIST OF INVOLVED PARTIES

The bankruptcy trustee, Robert P. Lindsey or his successor, represents the interests of the bankrupt entities and their creditors in these proceedings.

The defendants in this contempt proceeding, petitioners herein, are Wayne Cryts, William Cryts, Jr., Mrs. Wayne (Sandy) Cryts, Evans Ipock, and Bill Jewell. The undersigned counsel represent all of the defendants except Bill Jewell.

The United States of America chose to intervene in this case when it was appealed to the Eighth Circuit.

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D

REPORTS OF DECISIONS IN THE LOWER COURTS

The Decision of the District Court is reported at: *In re Cox Cotton Company,* 24 B.R. 930 (E.D. Ark., 1982).

The decision of the Court of Appeals from which appeal is sought is reported at: *Robert P. Lindsey, Trustee,* Appellee, v. *Evans Ipock and Wayne Cryts,* Appellants, 732 F.2d 619 (8th Circuit, 1984).

E

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment which petitioners seek to have reviewed was filed by the Eighth Circuit on April 14, 1984.

No rehearing was sought. No extensions of time have been sought or obtained from this Court.

A Writ of Certiorari is sought from this Court pursuant to 28 USC § 1254(1) and 28 USC § 2101(e).

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F

STATEMENT OF INVOLVED CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, §§ 1 and 2 of the United States Constitution provide in part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
>
> * * *
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[.]

28 USC § 1471 provides in part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11. (b) Not-

> withstanding an Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11. (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

28 USC § 1481 provides:

> A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment.

18 USC § 401 provides:

> A court of the United States shall have power to punnish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Bankruptcy Rule 920 provides in part:

> **(a) Contempt Committed in Proceedings Before Referee.**
>
> (1) *Summary Disposition by Referee.* Misbehavior prohibited by § 41(a)(2) of the Act may be punished summarily by the referee as contempt if he saw or heard the conduct constituting the contempt and it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the referee and entered of record.

(2) *Disposition by Referee upon Notice and Hearing.* Any other conduct prohibited by § 41(a) of the Act may be punished by the referee only after hearing on notice. The notice shall be in writing and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and whether the contempt is criminal or civil or both. The notice may be given on the referee's own initiative or on motion by a party, by the United States attorney, or by an attorney appointed by the referee for that purpose. If the contempt charged involves disrespect to or criticism of the referee, he is disqualified from presiding at the hearing except with the consent of the person charged.

(3) *Limits on Punishment by Referee.* A referee shall not order imprisonment nor impose a fine of more than $250 as punishment for any contempt, civil or criminal.

(4) *Certification to District Judge.* If it appears to a referee that conduct prohibited by § 41(a) of the Act may warrant punishment by imprisonment or by a fine of more than $250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence.

§ 405(d) of the Bankruptcy Reform Act of 1978 (28 USCA prec. § 1471 note) provides:

> The rules prescribed under section 2075 of title 28 of the United States Code and in effect on September 30, 1979, shall apply to cases under title 11, to the extent not inconsistent with the amendments made by this Act, or with this Act, until such rules are repealed or superseded by rules prescribed and effective under such section, as amended by section 248 of this Act.

11 USC § 363(f) provides:

> (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any inter-

est in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of such interest;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

———o———

G

STATEMENT OF THE CASE

1. Nature of the Case

This case arose out of a bankruptcy petition filed in the United States Bankruptcy Court for the Eastern District of Arkansas. The debtor was a large agri-business concern which counted among its assets several grain storage facilities in Arkansas and Missouri.

In the course of the bankruptcy proceedings, bankruptcy judge Charles W. Baker was asked by the trustee to hold several people, including the petitioners herein, in civil contempt for removing grain from one of the debtor's Missouri facilities. After several hearings, the Bankruptcy Court found the defendants to be in civil contempt and certified the matter to the District Court for criminal contempt proceedings. An appeal was taken to

the District Court for the Eastern District of Arkansas. Chief District Judge G. Thomas Eisele reversed the Bankruptcy Court's finding of contempt, holding that the Bankruptcy Court could not constitutionally exercise contempt power. The trustee appealed.

The United States Court of Appeals for the Eighth Circuit reversed, but declined to reach the constitutional issue. The Eighth Circuit, in an opinion by Chief Judge Lay, reasoned that the District Court had failed to give proper consideration to the prospective only application of *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

Since the Supreme Court had found at least some portion of the jurisdictional grant to bankruptcy courts unconstitutional, and had made its judgment prospective, Chief Judge Lay believed that all pre-*Marathon* uses of bankruptcy court jurisdiction were valid and could not now be challenged on constitutional grounds. Therefore, the District Court was in error when it considered the constitutionality of a pre-*Marathon* bankruptcy court order.

The contempt defendants now seek review in this court.

2. Facts

This case began as a bankruptcy adversary proceeding. It is part of a large and complex body of related litigation, in both state and federal courts, that surrounds the Cox Cotton Company bankruptcies.

Prior to the filing of the bankruptcy action, the debtors had voluntarily turned over their Missouri facilities to the Missouri Department of Agriculture, and that Department's director had been appointed by state courts as the receiver of those facilities pursuant to Missouri grain warehouse laws (Mo. Rev. Stat. §§ 411.010-.765 (1978), esp. 411.519(1), (2), and (6)).

One of the debtor's facilities was in Ristine, Missouri. It was in this facility that the Cryts family had stored its 1980 soybean crop, amounting to approximately 31,000 bushels.

In September, the receiver under Missouri law requested a hearing in the bankruptcy court to determine ownership of the grain. A hearing was scheduled but cancelled when, on the day scheduled for the hearing, the trustee converted the bankruptcy proceeding from a chapter 7 liquidation to a chapter 11 reorganization.

In the interim, the bankruptcy court granted possession of the Missouri facilities to the trustee.

On September 23, the trustee sought orders from the bankruptcy court allowing the sale of all grain in the Missouri and Arkansas facilities, regardless of who held evidence of title.

In response, the State of Missouri sought and obtained orders from the state courts allowing the receiver to take possession of and seize the Missouri facilities then in the trustee's possession.

The trustee immediately sought from the bankruptcy court contempt orders against the receiver and other Missouri officials.

The receiver responded by seeking a writ of prohibition in the Eighth Circuit. The writ was denied, but

without prejudice to the receiver seeking a similar writ in the District Court. The receiver filed a petition in the District Court, which was denied on December 2, 1980. An appeal was filed and the District Court's decision was upheld by the Eighth Circuit (674 F.2d 768 (1981)). Subsequently, the Supreme Court declined to grant a writ of certiorari (454 U.S. 1162).

Meanwhile, on February 16, 1981, Wayne Cryts and others removed the Cryts soybeans from the Ristine facility. The beans were transferred to another storage facility in nearby Bernie, Missouri.

The present adversary proceeding was commenced by the trustee in September of 1980 when authorization was sought to sell the grain free and clear of all liens. Wayne and William Cryts objected to the sale and asserted ownership of the beans. Nevertheless, on May 27, 1981, a bankruptcy court order was issued directing the trustee to sell all the grain, including the grain stored at Bernie.

The trustee arranged the sale of the Bernie grain to Bearhouse, Inc.

On July 22, 1981, Wayne Cryts and others removed grain from the Bernie facility. This removal was conducted in a peaceful manner.

The trustee filed his third and fourth motions for civil contempt against Wayne Cryts, Sandy Cryts, William Cryts, Jr., Evans Ipock and Bill Jewell. The motions sought contempt citations, as well as fines and damages.

After a series of hearings held from October 8, 1981 to April 28, 1982, the bankruptcy court found the defendants guilty of civil contempt and imposed a compensatory

fine of $287,708.73 along with a coercive fine of $1,500.00 per day. This judgment was appealed to the District Court and reversed in an order of November 17, 1982 (24 B.R. 930). The trustee appealed.

This Court's decision in *Northern Pipeline Co. v. Marathon Pipe Line Co.* had come down on June 28, 1982, but its effect was stayed until October 4, 1982 and later until December 24, 1982.

The District Court then held a *de novo* civil contempt hearing at which certain of the defendants were found guilty and fined $218,009.92. Defendants William Cryts, Jr. and Sandy Cryts were found not guilty. Wayne Cryts was subsequently tried for criminal contempt and acquitted by a jury.

On appeal, the Eighth Circuit concluded that the use of contempt power by the bankruptcy court was constitutionally proper because of the prospective only application of the *Marathon* decision. Accordingly, the Eighth Circuit remanded the case to the District Court for consideration of whether the contempt order was "the least possible power adequate to the end proposed," and whether the findings of the bankruptcy court were clearly erroneous. 732 F.2d at 625.

At this writing, the District Court has not yet filed an opinion after the remand.

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H

THE ORIGINAL BASIS FOR FEDERAL JURISDICTION

This action began as an adversary proceeding in the Bankruptcy Court, which asserted jurisdiction pursuant to 28 USC § 1471(c), 28 USC § 1481 and 18 USC § 401.

The appeal to the District Court was pursuant to 28 USC § 1334.

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I.

ARGUMENT

1. The prospective application of the Marathon holding, a principle which tends both to invalidate future uses of bankruptcy jurisdiction and to validate past ones, should be limited to the specific holding of that case.

In *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), this Court was called upon to decide whether, under the jurisdiction granted by § 241(a) of the Bankruptcy Act of 1978, particularly 28 USC § 1471, a bankruptcy court could hear and resolve state law contract and misrepresentation claims.

The resulting decision was a fragmented one in which a plurality of four Justices found the entire jurisdictional grant unconstitutional as an improper delegation of Article III judicial power to an Article I court. Two Justices concurred but thought that the Court's holding should be limited to the type of state-law claims raised by the facts of the case, and three Justices dissented.

In their concurring opinion, Justices Rehnquist and O'Connor concluded that the specific authority used by the bankruptcy court in the case at bar violated Article III; and because that grant of authority was not readily

severable from the remaining grant of authority to the bankruptcy courts under § 1471, they concurred in the judgment. 458 U.S. at 91-92.

In his dissenting opinion, Chief Justice Burger expressed the view that the holding of the Court was limited to the proposition stated by Justice Rehnquist "that a 'traditional' state common law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an 'Article III court' if it is to be heard by any court or agency of the United States." *Id.* at 92. This characterization of the holding was expressly rejected by the plurality. 458 U.S. at 87, note 40.

Perhaps it is not surprising that in the two years since the *Marathon* decision, lower federal courts have had a difficult time defining its holding, or coming to any agreement as to how it should be applied. The confusion that reigns in this area will be described below, but all courts have agreed that *Marathon* is to be applied prospectively only. Such prospectivity is expressly mandated in both the plurality opinion, part V (458 U.S. at 87-89) and the concurrence (*Id.* at 92). Thus, prospectivity, at least, commanded a majority of the Court.

In the opinion from which petitioners seek to appeal, the Eighth Circuit relied heavily on this prospective aspect of *Marathon* and founded its holding upon the principle that a prospective ruling of unconstitutionality implies retroactive validity, thus precluding challenges to pre-*Marathon* acts or final determinations. *Lindsey v. Ipock*, 732 F.2d 619 (8th Cir., 1984), at 623-24; see also:

White Motor Corp. v. Citibank, 704 F.2d 254, 258 (6th Cir., 1983); *Buckley v. Valeo*, 424 U.S. 1 (1976).

While it may well follow that prospective unconstitutionality implies retrospective validity, there remains a question as to what exactly is prospective. That is, what defines and limits the kinds of acts which are hereafter unconstitutional and therefore, by implication, may not be challenged if they were done prior to the Court's order?

The simple and obvious answer to such a question is that the prospective aspect of the ruling is limited to the holding in the case. Acts upon which the Court's holding on the merits did not impact may no more be affected by the prospectivity aspect of the ruling.

This is not the position taken by the Eighth Circuit. That court has held on the one hand that the *Marathon* decision is of a limited application as it applies to future bankruptcy power,[1] and on the other hand that because of its prospective effect, it validates all previous bankruptcy court acts or final determinations.

The Eighth Circuit has thus taken the position that the *Marathon* holding stands at a point in time from which it casts a thin shadow forward but somehow a broad, all-encompassing shadow into the past. While there is some

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[1] In *In re Hansen*, 702 F.2d 728 (1983), the Eighth Circuit held, *per curiam*, that the *Marathon* holding is limited to the unconstitutionality of 28 USC §1471(c). The jurisdictional grant used by the bankruptcy court below, and validated by the decision from which appeal is sought, is found in 28 USC §1481 and 18 USC §401.

support for this position,[2] the better authority suggests that a ruling of prospectivity operates only within the perimeter of the specific holding of the case.

The District Court which was reversed by the Eighth Circuit below assumed, as did the petitioners, that *Marathon* was instructive and helpful but not controlling. This was thought to be so because the *Marathon* holding was limited to Justice Rehnquist's concurrence which did not address the contempt power used by bankruptcy judge Baker. The District Court was well aware that the *Marathon* holding was prospective only, but did not consider that fact dispositive because that holding, prospective or not, did not address the issue at hand. *Lindsey v. Cryts*, 24 B.R. at 955-57.

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[2] *In Frankford Trust Co. v. Allanoff*, 29 B.R. 407 (E.D.Pa., 1983), the court noted that bankruptcy court contempt power had been "drawn into question" by *Marathon* and *Cryts v. Lindsey*, 24 B.R. 930, but added that since *Marathon* was not retroactive, "it is unnecessary to determine its affect on this case." at 411, n.3. In the case relied upon by the Eighth Circuit, *Martin-Trigona v. Shiff*, 702 F.2d 380 (2d Cir., 1983), the court reviewed a contempt order by a bankruptcy court. The Second Circuit expressed doubts about the constitutionality of 28 USC §1481 in the wake of *Marathon* and *Lindsey v. Cryts*, but noted that the bankruptcy court decision was not affected by *Marathon* because it applied only prospectively. Neither of these cases is contrary to the position taken by petitioners. Both hold that the pre-*Marathon* actions of bankruptcy courts are not affected by *Marathon* because of its prospectivity. Neither precludes all constitutional challenges to pre-*Marathon* bankruptcy court actions. Neither validates all bankruptcy court actions prior to the effective date of *Marathon*. Petitioners contend that their case is simply not within the *Marathon* holding, not affected one way or the other by its prospectivity, and therefore a fair subject for decision. In *Gray v. Snyder*, 704 F.2d 709 (4th Cir., 1983), the Fourth Circuit said, confusingly, that because of its prospectivity, decisions rendered by bankruptcy courts before the effective date of *Marathon* are "presumptively" valid.

Several Courts of Appeals seem to have agreed with the District Court's treatment of the prospectivity issue, and thus disagreed with the Eighth Circuit.

In *1616 Reminc Limited Partnership v. Atchison & Keller Co.*, 704 F.2d 1313 (4th Cir., 1983), the Fourth Circuit adjudicated the constitutionality of a particular exercise of bankruptcy power despite the appellee's argument that it should not do so because of the prospectivity of the *Marathon* holding. The constitutional issue was held to be a proper one because it was not "the same issue decided in *Marathon*" and the challenge was initiated and argued prior to *Marathon*. *Id.* at 1316.

In *Costal Steel v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190 (3d Cir., 1983), the prospectivity of the *Marathon* decision was held to be inapplicable because the policies favoring prospectivity had no application to the case at bar. *Id.* at 199.

In *In re Klapp*, 706 F.2d 998 (9th Cir., 1983), the Court of Appeals took jurisdiction and resolved a bankruptcy appeal on the merits, concluding that because of its prospectivity, *Marathon* had no application to the bankruptcy decision.

In the excellent discussion found in *In re Dartmouth House Nursing Home, Inc.*, 30 B.R. 56 (1983), a First Circuit Bankruptcy Appellate Panel considered the constitutionality of bankruptcy appellate jurisdiction under 28 USC § 1482. The panel ruled that *Marathon* did not resolve this issue because of its limited holding. However, the panel went on to conclude that such appellate jurisdiction violates Article III of the Constitution. The panel did not believe that it was precluded from ruling pre-

Marathon actions of bankruptcy judges to be unconstitutional. This was so simply because the particular actions involved did not fall within the *Marathon* holding and were therefore not affected by its prospectivity. This decision is remarkably similar to that of the District Court below, which ruled on the constitutionality of 28 USC § 1481, another statute thought to be unaffected by *Marathon*.

Similar rulings may be found in *In re Sewanee Land, Coal and Cattle, Inc.*, 34 B.R. 696 (N.D. Ala., 1983); *In re Pasco Tobacco Co., Inc.*, 34 B.R. 295 (B.E.D. Pa., 1983); and *In re Newlin*, 29 B.R. 781 (E.D. Pa., 1983).

Thus the Eighth Circuit, with its holding that the *Marathon* ruling of prospectivity precludes all challenges to pre-*Marathon* uses of bankruptcy jurisdiction, finds itself opposed to the weight of authority and at the center of a conflict among the Circuits. This issue seems ripe for adjudication by this Court.

Of course, the issue of the scope of the *Marathon* holding may still be fairly raised. If *Marathon* acts to invalidate all future bankruptcy jurisdiction, it may be fairly said to validate all past uses of bankruptcy jurisdiction because of its prospectivity. It is to this issue that the petitioners will now turn.

2. The lower federal courts have had a great deal of difficulty defining the limits of the Marathon holding and applying it to particular cases. This difficulty has caused several conflicts among the circuits and has resulted in confusion in the law of bankruptcy.

Because the opinion of the Court in *Marathon* did not command a majority of the Justices, and because the

Court's holding seems to be characterized differently by the plurality, the concurring Justices and at least one dissenting Justice,[3] the lower federal courts have had difficulty applying this case and defining its proper use. The Bankruptcy Court for the Northern District of Iowa expressed the views of many observers when it said:

> This court observes that it may be an understatement to assert that since *Marathon,* the courts of bankruptcy have labored under a shadow of jurisdictional uncertainty. *In re Rath Packing Co.,* 35 B.R. 615 (N.D. Iowa, 1983).

Most courts have agreed that the holding of the Court is limited to the concurring opinion of Justice Rehnquist, but there seems to be some considerable dispute as to exactly what that means.[4]

It seems clear that the holding, as limited by the concurring opinion, is less broad than the opinion expressed for the plurality by Justice Brennan; but there is no agreement as to either the scope of the plurality opinion or how it is limited by the concurrence.

The result has been that literally hundreds of cases involving these issues have been decided by lower federal courts, and no coherent rules of law are yet on the horizon. Consequently, this area is badly in need of guidance from this Court.

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[3] See: Opinion of Brennan, J., at 458 U.S. 87, esp. note 40; concurring opinion of Rehnquist, J., at 458 U.S. 91-92; opinion of Burger, C.J., at 458 U.S. 92.

[4] See: *In re Lear Colorprint,* 29 B.R. 438 (N.D.Ill., 1983), at 493, in which Justice Rehnquist's concurrence is referred to as a "masterpiece of ambiguity."

The decisions regarding the limitations to be put on the *Marathon* holding fall roughly into two categories. Some courts have emphasized particular statutes to which the *Marathon* holding does or does not apply. Other courts have concluded that *Marathon* does not invalidate all bankruptcy jurisdiction, but calls for adjudication of particular uses of that jurisdiction according to some standard or test. A great many tests have been suggested.

The petitioners will not attempt at this time to present an exhaustive review of the *Marathon* progeny. Their purpose is to show the Court some of the cases and holdings and thereby demonstrate the confusion and difficulty into which this area of the law has fallen.

The *Marathon* plurality made reference to § 241(a) of the Bankruptcy Act of 1978. This section has been codified as a number of statutes affecting bankruptcy jurisdiction, including 28 USC § 1471 and 28 USC § 1481, the statute involved in this case.[5]

Some courts have concluded that *Marathon* found all of § 241(a) unconstitutional, at least as it applies to bankruptcy judges.[6]

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[5] Section 241(a) amends title 28 of the United States Code by adding chapter 90. Chapter 90 includes section 1471, jurisdiction of bankruptcy courts, sections 1472 to 1477, venue of bankruptcy cases and proceedings, sections 1478 to 1479, removal to bankruptcy courts, section 1480, jury trials, section 1481, powers of bankruptcy courts, and section 1482, jurisdiction of bankruptcy appellate panels.

[6] See: *Martin-Trigona v. Shiff, supra* (8th Cir., 1983), at 384, note 8: "the entire statutory scheme of the Reform Act has been shaken by [*Marathon*]"; *In re Klapp*, 706 F.2d 998 (9th

(Continued on next page)

A large controversy has developed over the question of whether *Marathon* affected the power of federal district courts to exercise bankruptcy jurisdiction. 28 USC §§ 1471(a) and (b) refer to district court jurisdiction over bankruptcy matters while § 1471(c) deals with the jurisdiction of the new bankruptcy courts.

Some courts, relying on the references in *Marathon* to § 1471 and Justice Rehnquist's views on non-severability, have concluded that all of § 1471 is unconstitutional and thus the district courts are deprived of bankruptcy jurisdiction.[7]

(Continued from previous page)

Cir., 1983), at 999, note 1: "On June 28, 1982, the Supreme Court rendered its decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, holding that 'the broad grant of jurisdiction to the bankruptcy courts contained in §241(a) [of the Reform Act, 28 U.S.C. §1471(a),] is unconstitutional.' — U.S. —, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598. The majority stated that since the grant of authority challenged in *Marathon* was not severable from the remaining grant of authority in section 241(a) no purported exercise of judicial authority by a bankruptcy court under section 241(a) was valid. See id. at 2880 n. 40 (plurality opinion); id. at 2882 (Rehnquist, J., concurring);" *In re Motion to Dismiss*, 23 B.R. 334 (B.N.D. Ga., 1982), at 336 (all of §241(a) unconstitutional after *Marathon*); *In re Northwest Erections, Inc.*, 34 B.R. 111 (D. Mont., 1983) (*Marathon* voided the power of the bankruptcy courts *in toto*); *In re Sapolin Paints, Inc.*, 30 B.R. 792 at 794 (B.E.D.N.Y., 1983) (beginning on December 25, 1982, the bankruptcy courts ceased to have jurisdiction under §241(a)).

[7] See: *Rhodes v. Stewart*, 705 F.2d 159 (6th Cir., 1983); *In re Romeo J. Roy, Inc.*, 32 B.R. 1008 (D. Maine, 1983); *Pine Associates v. Aetna Cas. Sur. Co.*, 36 B.R. 878 (D. Conn., 1983); *In re Conley*, 26 B.R. 885 (B.M.D. Tenn., 1983); *In re Brown*, 32 B.R. 590 (B.N.D. Ga., 1983); *In re Shear Realty & Investment Co.*, 25 B.R. 463 (B.S.D. Ohio, 1982); *In re Motion to Dismiss*, 23 B.R. 334 (B.N.D. Ga., 1982); *Butz v. Society Nat. Bank of the Miami Valley*, 30 B.R. 182 (B.S.D. Ohio, 1983).

Most courts, on the other hand, have limited the application of *Marathon* to § 1471(c) and therefore to bankruptcy courts.[8]

Thus, the non-severability language in Justice Rehnquist's concurrence has been thought by some to apply to all of § 241(a). Others believe it invalidates all of § 1471, including district court power over bankruptcy. Still others hold that only § 1471(c) jurisdiction may not be severed.

Following *Marathon*, the various courts have adopted interim rules regarding bankruptcy jurisdiction. They typically allow bankruptcy courts to continue to operate as adjuncts to the district courts. These rules, too, have been subject to varying and conflicting adjudications.[9]

Many courts have concluded that the *Marathon* holding calls for a case-by-case analysis as to what sorts of

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[8] See: *In re Hansen*, 702 F.2d 728 (8th Cir., 1983); *White Motor Corp. v. Citibank*, 704 F.2d 254 (6th Cir., 1983); *Oklahoma Health Services Federal Credit Union v. Webb*, 726 F.2d 624 (10th Cir., 1984); *In re Braniff Airways, Inc.*, 27 B.R. 231 (N.D. Tex., 1983), affd. 700 F.2d 215 (5th Cir., 1983); *In re Kaiser*, 722 F.2d 1574 (2d Cir., 1983); *In re Color Craft Press, Ltd.*, 27 B.R. 962 (D. Utah, 1983); *B & J's Liquors, Inc. v. American Nat. Bank & Trust Co.*, 29 B.R. 1011 (N.D. Ind., 1983); *Cradle of Democracy Broadcasting Co, Inc. v. David Green Broadcasting Consultants Corp.*, 33 B.R. 1004 (E.D. Va., 1983); *In re Guarantee Chevrolet*, 35 B.R. 381 (S.D. Cal., 1983); *In re Holmes*, 32 B.R. 721 (N.D. Cal., 1983); *Ravin v. New Jersey Bank*, 32 B.R. 716 (D.N.J., 1983); *In re Hidalgo Industries, Inc.*, 35 B.R. 804 (B.D. Puerto Rico, 1983).

[9] See: *In re Hidalgo Industries, Inc.*, 35 B.R. 804 (B.D. Puerto Rico, 1983) and *In re Romeo J. Roy, Inc.*, 32 B.R. 240 (B.D. Maine, 1983): (local rules unconstitutional). *In re Color Craft Press, Ltd.*, 27 B.R. 962 (D. Utah, 1983) and *In re Northland Partners*, 26 B.R. 860 (E.D. Mich., 1983): (local rules constitutional).

power may and may not be exercised by bankruptcy courts. A great many tests and standards have been suggested against which bankruptcy jurisdiction should be measured. These include: whether a civil case brought in a bankruptcy court is "related to" a case under Title 11;[10] whether jurisdition is taken over a case that, in the absence of a bankruptcy petition, could have been brought in a federal or state trial court;[11] whether the case involves private, state created claims which are not strictly raised as part of the bankruptcy proceeding;[12] whether the case seeks the adjudication of private, as opposed to public, rights;[13] whether the adjudication involves the substantive rights of third parties;[14] or whether the case is one involving the "essential attributes of the judicial power."[15]

A number of courts have accepted Chief Justice Burger's narrow characterization of the *Marathon* hold-

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10 See: *United States v. Canel*, 708 F.2d 894 (3d Cir., 1983); *Herrera v. Weaver Const. Co.*, 29 B.R. 49 (D. Colo., 1983).

11 See: *In re Turner*, 29 B.R. 419 (N.D.N.Y., 1983); *Leonetti v. Leonetti*, 28 B.R. 1003 (B.E.D. Pa., 1983).

12 See: *In re Warren*, 24 B.R. 846 (B. W.D. Ky., 1982).

13 See: *In re Sentinel Energy*, 27 B.R. 795, 799 (D. Mass., 1983); *In re Colby*, 23 B.R. 142, 143 (B.W.D. Wis., 1982); *In re Seton-Scherr*, 26 B.R. 563, 565 (B.N.D. Ohio, 1983); *In re Motion to Dismiss*, 23 B.R. 334, 342 (B.N.D. Ga., 1982); *In re Tremblay*, 31 B.R. 200 (B. D. Vt., 1983); *Anderson v. C.B.S.*, 31 B.R. 161 (B.N.D. Ga., 1982).

14 See: *In re Manville Forest Products Corp.*, 31 B.R. 991 (S.D. N.Y., 1983).

15 *In re Cox Cotton Co.*, 24 B.R. 930 (E.D. Ark., 1982); *In re Dartmouth House Nursing Home*, 30 B.R. 56, 62 (Bankr. App. Panel, 1st Cir., 1983); *In re BSC Audio Inc.*, 35 B.R. 722 (W.D. Ark., 1983).

ing, despite the plurality opinion's rejection of that characterization.[16] Some courts have limited the *Marathon* holding strictly to its facts; others have applied it more expansively. Several courts have concluded that issues not squarely addressed in *Marathon* are proper ones for decision, despite the ruling of prospectivity, even if they arose prior to the effective date of *Marathon*. As far as petitioners can determine, only the Eighth Circuit has squarely concluded that the *Marathon* holding applies in a limited way prospectively, but in an unlimited way retrospectively. There has also been confusion as to the proper application of the two stays of the effective date of judgment.[17]

Clearly, there is great uncertainty and confusion among the federal courts in this area. The proper scope and application of the *Marathon* holding is an issue as to which the various circuits, as well as many district courts and bankruptcy courts, have been unable to even approach agreement. Guidance from this Court is sorely needed.

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[16] See: *In re Colorado Energy Supply, Inc.*, 728 F.2d 1283 (10th Cir., 1984); *Pettigrew v. Kutak, Rock & Huie*, 30 B.R. 989 (N.D. Ga., 1983); *In re Yoder Co.*, 29 B.R. 299 (B.S.D.N.Y., 1983); *Karen-Richard Beauty Salon, Inc. v. Fontainebleau Hotel Corp.*, 36 B.R. 896 (S.D. Fla., 1983).

[17] The Court twice stayed the operation of its judgment, first until October 4, 1982, and then until December 24, 1982. Most courts have concluded that affected uses of bankruptcy jurisdiction are proper if they occurred prior to December 24, 1982 (*White Motor Co., supra* (6th Cir.); *In re Klapp, supra* (9th Cir.); *In re Park Nursing Center, Inc.*, 28 B.R. 793 (B.E.D. Mich., 1983); *Funding Systems Railcars, Inc. v. Pullman Standard, Inc.*, 34 B.R. 706 (N.D. Ill., 1983)). However, some courts have held that unconstitutional acts which occurred after the *Marathon* decision but before the expiration of the stay are improper and may not be upheld (*In re Sewanee Land, Coal and Cattle, Inc.*, 34 B.R. 696 (N.D. Ala., 1983); *In re Cherry Pond Coal Co.*, 21 B.R. 588 (B.S.D.W. Va., 1982)).

3. Lower federal courts are badly divided on the issue of whether Bankruptcy Rule 920 (411 U.S. 989, 1100 (1973)) limits the contempt power of bankruptcy judges under the Bankruptcy Reform Act of 1978.

In 1973, the United States Supreme Court promulgated and adopted the Rules of Bankruptcy Procedure. 411 U.S. 989 (1973). Bankruptcy referees for the first time were granted a limited power of contempt pursuant to Rule 920, which essentially provided that a referee could punish both civil and criminal contemptuous behavior by imposing a fine of not more than $250.00. If the referee wished to impose a fine greater than $250.00 or imprisonment, he was required to certify the facts to the district judge for disposition. See: *In re Cox Cotton Co.*, 24 B.R. 930 at 940-942 (E.D. Ark., 1982).

In 1978, Congress passed the Bankruptcy Reform Act of 1978, certain provisions of which expanded the contempt power of the bankruptcy referee, who was now known as a bankruptcy judge. 11 U.S.C. § 105(a) provided:

> The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

28 USC §1481 stated:

> A bankruptcy court shall have the power of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment.

The Bankruptcy Reform Act of 1978 also included the following provision:

> The rules prescribed under section 2075 of Title 28 of the United States Code and in effect on September 30, 1979, shall apply to cases under Title 11, to the extent not inconsistent with the amendments made by this Act, or with this Act, until such rules are repealed or superseded by rules prescribed and effective under such section, as amended by section 248 of this Act.

Pub.L 95-598, § 405(d), 92 Stat. 2549, 2685 (1978). Thus, since the passage of § 1481 in 1978, bankruptcy courts throughout the nation have been wrestling with the issue of whether the contempt power granted by § 1481 is limited by Bankruptcy Rule 920, or whether section 920 is inconsistent with, and thus superseded by, § 1481. The Bankruptcy Code is silent on the subject. Consequently, the courts are split.

At least one Circuit Court of Appeals has determined that Rule 920 does not limit the contempt powers granted to bankruptcy courts by § 1481. *Lindsey v. Ipock*, 732 F.2d 619 (8th Cir., 1984). This is the decision from which petitioners herein seek to appeal. Numerous bankruptcy courts as well have ruled that the limitations found in Rule 920 are no longer applicable under the Code. *In re Stacy*, 21 B.R. 49 (Bankr., W.D. Va., 1982); *In re Gibson*, 16 B.R. 682 (Bankr., S.D. Ohio, 1981); *In re Reed*, 11 B.R. 258 (Bankr., D. Utah, 1981); *In re Johns-Manville Corp.*, 26 B.R. 919 (Bankr., S.D.N.Y., 1983); *In re Wariner*, 16 B.R. 216 (Bankr., N.D. Texas, 1981); *Matter of Lowe*, 18 B.R. 20 (Bankr., N.D. Ga., 1981); *In re Shropshire*, 25 B.R. 128 (Bankr., W.D. Wash. 1982).

However, at least one district court has held that Rule 920 continues to limit the § 1481 powers of the bank-

ruptcy courts. *Horace v. Moore,* 24 B.R. 892 (N.D. Ill., 1982). In addition, a substantial number of bankruptcy courts have held Rule 920 to limit their § 1481 powers. *In re Whitaker,* 16 B.R. 917 (Bankr., M.D. Tenn., 1982); *In re Brooks,* 12 B.R. 283 (Bankr., W.D. Mo., 1981); *Matter of Pal Transport, Inc.,* 13 B.R. 935 (Bankr., M.D. Fla., 1981); *In re Norton,* 15 B.R. 623 (Bankr., E.D. Pa., 1981); *In re Mantolesky,* 14 B.R. 973 (Bankr., D. Mass., 1981).

The state of uncertainty in regard to this issue is evidenced by other court decisions as well. The district court in *In re Cox Cotton Co.,* 24 B.R. 930 (E.D. Ark., 1982), did not reach the issue, but pointed out the inconsistency on the part of the bankruptcy courts in construing Rule 920 with § 1481. To add to the uncertainty, certain courts have interpreted Rule 920 to place a limit upon fines imposed as punishment for acts of contempt, but not upon fines imposed for compensatory purposes. In *Matter of Gorin,* 18 B.R. 151 (Bankr., D.Conn., 1982), the court held that compensatory fines are not limited by Rule 920, but refrained from deciding whether punitive fines are likewise not limited by Rule 920, noting:

> Furthermore, since the enactment of the Bankruptcy Reform Act of 1978, it is questionable whether subsection (a)(3) of Rule 920 survives as it may conflict with 28 U.S.C. § 1481 which contains no monetary limits upon the bankruptcy court's contempt power.

Id. at 153. The United States Bankruptcy Appellate Panel for the Ninth Circuit in *In re Zartun,* 30 B.R. 543 (U.S. Bankr. App. Panels, 9th Cir., 1983), left open the question of whether Rule 920 permits a bankruptcy judge

to impose a fine of more than $250.00, holding that the fine imposed in the instant case, which was in excess of $250.00, was compensatory rather than punitive, and thus not subject to the Rule 920 limitations. See also *In re Brooks,* 12 B.R. 282 (Bankr., W.D. Mo., 1981); *In re Whitaker,* 16 B.R. 917 (Bankr., M.D. Tenn., 1982). But see *contra, Matter of Pal Transport, Inc.,* 13 B.R. 935 (Bankr., M.D. Fla., 1981) (allowing compensatory fines in excess of $250.00 would render the provisions of Rule 920 largely meaningless).

In light of the fact that substantial disagreement exists among district courts and bankruptcy courts throughout the country as to the effect of Rule 920 on the contempt power bestowed upon the bankruptcy courts by § 1481, and since this question remains an open one in almost every circuit, it is imperative that this issue be resolved. Since Congress has demonstrated an unwillingness to assume the task of revising or clarifying the Bankruptcy Code so as to remedy such problems, it falls to this Court to address and resolve this issue, in the interest of promoting the prompt and efficient disposition of bankruptcy matters and of avoiding further protracted and unnecessary litigation and confusion.

4. The standard of review to be applied in appeals of bankruptcy court orders is whether the decision was "clearly erroneous." This standard may violate Article III of the Constitution by granting too much deference to the judgment of an Article I Court.

In the decision of the Eighth Circuit from which petitioners seek to appeal, the case was remanded to the District Court with instructions to review the Bankruptcy Court's findings to see if they were "clearly erroneous." 732 F.2d at 625.

There is authority to suggest that this "clearly erroneous" standard of review violates the requirements of Article III by granting too much deference to the findings of Article I courts. *1616 Reminc Limited Partnership v. Archison & Keller Co.*, 704 F.2d 1313 (4th Cir., 1983); *In re Bakers Equipment/Winkler, Inc.*, 33 B.R. 307 (B.D.N.J., 1983).

Because of the importance of this issue to bankruptcy appeals, it is a proper one for review in this Court.

In addition, however one views the *Marathon* holding, clearly it does not preclude consideration of the constitutionality of this standard of review as applied in a future appeal.

5. The jurisdiction of the Bankruptcy Court to order the sale of the petitioners' grain, given the orders of two superior courts and the requirements of 11 USC §363 (f), is open to doubt.

The petitioners have contended throughout these proceedings that the Bankruptcy Court failed to comply with the requirements of 11 USC § 363(f) when it ordered the sale of their grain.

Because this issue is an important one relating to the administration of the growing number of grain elevator bankruptcies, petitioners believe that it should be resolved by this Court.

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CONCLUSION

The Eighth Circuit is in conflict with other Courts of Appeals on the issue of whether *Marathon* acts to validate all past exercises of bankruptcy jurisdiction. In addition, the circuits are badly divided on the issue of the proper scope and application of the *Marathon* holding.

Lower federal courts have been unable to decide whether Bankruptcy Rule 920 still applies under the 1978 Code.

The inability of the federal courts to find a uniform way in which to apply the landmark *Marathon* decision has reduced the national bankruptcy system to a state of confusion and disarray. It now falls to this Court to provide the guidance that is needed.

Because such guidance is needed, and the present case is one within which many important and unresolved issues are raised, petitioners believe that the decision of the Court of Appeals should be reviewed.

Petitioners respectfully pray that the Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

A. The opinion of the United States Court of Appeals for the Eighth Circuit in *Lindsey v. Ipock,* 732 F.2d 619 (1984).

B. Portions of the opinion of the United States District Court for the Eastern District of Arkansas in *In re Cox Cotton Co.,* 24 B.R. 930 (1982).

APPENDIX A

Robert P. LINDSEY, Trustee,

Appellee,

v.

Evans IPOCK and Wayne Cryts,

Appellants.

Bill Jewell.

Robert P. LINDSEY, Trustee,

Appellant,

v.

Mrs. Wayne CRYTS a/k/a Sandy Cryts; William Cryts, Jr.; Evans Ipock; Bill Jewell; Wayne Cryts,

Appellees.

Nos. 83-1534, 83-1562.

United States Court of Appeals,
Eighth Circuit.

Submitted Nov. 16, 1983.
Decided April 13, 1984.

LAY, Chief Judge.

On August 11, 1980, Cox and Frisbee Cotton Companies filed a voluntary chapter 7 bankruptcy proceeding. Thereafter, upon the debtors' motion, the proceeding was converted to a chapter 11 reorganization. Robert Lindsey was appointed a trustee under chapter 11.

Debtors' assets consisted primarily of grain storage facilities. The ownership of the grain therein—some 3.27 million bushels—was subject to dispute. Wayne Cryts had stored 31 thousand bushels of soybeans in debtors' Ristine, Missouri, elevator, though he did not have clear title to this grain. Cryts had pledged the negotiable warehouse receipts issued by debtor to Commodity Credit Corp.

On September 23, 1980, the trustee sought authorization from the bankruptcy court, pursuant to 11 U.S.C. § 363, to sell the grain in debtors' facilities. The liens and ownership claims were to attach to the proceeds of the sales. Various farmers, including Cryts, filed objections. In addition, the State of Missouri commenced five separate Missouri state court receivership actions and obtained ex parte injunctions on October 20, 1980, against the trustee and the bankruptcy court, which enjoined them from exercising jurisdiction over the grain. The next day the State of Missouri received an ex parte stay order from this court, which operated as a blanket stay of all proceedings in the bankruptcy court. This court then entered an order on April 8, 1981, sustaining the jurisdiction of the bankruptcy court. *State of Missouri v. United States Bankruptcy Court,* 647 F.2d 768 (8th Cir. 1981).

On May 18, 1981, the bankruptcy court held a hearing to determine whether the Missouri grain should be sold free and clear of all liens and interests. The evidence

revealed substantial, conflicting claims of various types to all the Missouri grain. Additionally, the condition of the grain was poor and was rapidly deteriorating. The bankruptcy court thus authorized the trustee to sell the Missouri grain, with all claims and liens to attach specifically to the net sale proceeds. This order was not appealed.

The trustee contracted to sell the grain to Bearhouse, Inc. To prevent the sale of the 31 thousand bushels that Cryts claimed an interest in, Cryts and others unlawfully took possession of an elevator in Bernie, Missouri, and removed at least 31 thousand bushels of soybeans. The immediate loss to debtors was approximately $218,000.[1]

The trustee moved in the bankruptcy court to hold Cryts and others in civil contempt for the removal of the grain from the Bernie elevator. The court conducted hearings over a seven-month period and eventually concluded, on June 7, 1982, that Cryts and others had conspired to deprive the trustee of the property of the estate when they were fully aware that the grain was in the control and jurisdiction of the bankruptcy court. The fine imposed was the losses and expenses of the estate plus interest, which totaled $287,708. To induce compliance, the court also assessed a penalty of $1,500 per day from the date of its contempt judgment.

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[1] Cryts and others also were involved in the unlawful removal on February 16-18, 1981, of this same grain from Ristine, Missouri. This court ordered the grain impounded in Bernie after the Ristine removal. In addition, Cryts was involved in the unlawful blockade of the Ristine elevator on July 20, 1981. These incidents, however, are not part of the present contempt appeal.

Cryts and others appealed this contempt judgment to the district court, challenging the bankruptcy court's jurisdiction to authorize the sale of the grain and exercise civil contempt powers. The district court held that the bankruptcy court had jurisdiction to authorize the sale of the grain, but further held that the contempt power exercised by the bankruptcy court was unconstitutional because of its Article I status. The district court then held its own civil contempt hearing in February of 1983, which resulted in a civil contempt judgment against Cryts only. The others subject to the bankruptcy court's contempt judgment either were found in contempt but no monetary judgment assessed or were found not in contempt. The fine imposed against Cryts was $272,550 plus interest from the date of the bankruptcy court's judgment.

On appeal, the trustee asserts that the district court erred in holding the bankruptcy court lacked constitutional authority to exercise contempt power, that Cryts is estopped to challenge the bankruptcy court's contempt power, and that the district court erred in not making its order prospective. On cross appeal Cryts contends that the bankruptcy court lacked jurisdiction to sell the grain and therefore there was no authority for the court to hold Cryts in contempt.

I. Bankruptcy Court Jurisdiction

We address the issue raised on the cross appeal first. Cryts argues that the bankruptcy court only had preliminary jurisdiction over the grain to determine ownership. This court, in its April 8, 1981, opinion, 647 F.2d 768, stated that the trustee's interest in the grain was "sufficient to

trigger preliminary jurisdiction over the property in the bankruptcy court." *Id.* at 774. We went on to say that "the bankruptcy court must make the final determination of property interests after full presentation of the evidence." *Id.* Before authorizing the trustee to sell the grain, the bankruptcy court was to "carefully consider the requirements of section 363(f) and the duty under the Code to protect the property interests of third parties." *Id.* at 778. We directed that "[t]he bankruptcy court should particularly examine its authority to order the sale if title documents indicate that the estate possesses no substantial ownership rights to the grain and that any bona fide dispute over the property exists only between third parties." *Id.*

Section 363(f) allows the bankruptcy court to authorize the sale

> free and clear of any interest in such property of an entity other than the estate, only if—
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of such interest;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). The district court agreed with the bankruptcy court's findings that subsections (4) and (5) were satisfied and therefore authorization of the sale was

justified. *In re Cox Cotton Co.*, 24 B.R. 930, 937 (D.C. E.D.Ark.1982).

Cryts disagrees, however, and argues that the conditions were not met for the sale authorization. Cryts claims that neither subsections (4) or (5) were satisfied and that Cryts, as legal owner, thus had the right to remove the 31,000 bushels of soybeans because the trustee held the soybeans solely as a bailee.

[1-3] Cryts' argument fails for two reasons. First, he may not belately attack the bankruptcy order of sale in these collateral proceedings; once Cryts was apprised of the bankruptcy court's sale order and failed to timely appeal, he was obligated to obey these orders even if they were in error. Second, we think it clear from the overall evidence that the district court's extensive analysis and ultimate conclusion with respect to the bankruptcy court's jurisdiction over the grain, *see* 24 B.R. at 933-39, was not in error. Thus, we conclude the bankruptcy court did not err in ordering the sale of the grain.[2]

II. Bankruptcy Court Contempt Power

The fundamental question before us is the constitutionality of Congress's delegation in the 1978 Bankruptcy

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[2] The trustee argues that Cryts is estopped from challenging the constitutionality of the bankruptcy court's contempt power because Cryts consented to subject matter jurisdiction. Cryts had filed a claim with the bankruptcy court on behalf of his partnership farming operation asking for affirmative relief. This action, asserts the trustee, precludes the inconsistent position that the bankruptcy court is not constitutionally vested with contempt powers. This argument has little merit. It is fundamental that subject matter jurisdiction cannot be waived by the parties. *U.S. ex rel. Burnette v. Driving Hawk*, 587 F.2d 23 (8th Cir. 1978). The challenge of the bankruptcy court's contempt power is in essence a challenge to the court's subject matter jurisdiction for contempt. We find Cryts is not estopped from challenging the constitutionality of this jurisdiction.

Reform Act of civil contempt powers to bankruptcy courts. The district court, in a thorough, analytical opinion found that exercise of the contempt power by the bankruptcy judge was unconstitutional. The core analysis of the district court's opinion was that the judicial power of the United States can be vested only in Article III judges, that bankruptcy judges are not Article III judges, and that the delegation of contempt power to bankruptcy judges is therefore unconstitutional.

[4, 5] We do not pass on the merits of the district court's analysis; we conclude that the district court erred in failing to give proper recognition to the prospective holding of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). In holding that the decision regarding the unconstitutionality of the Bankruptcy Reform Act of 1978 should not be applied retroactively, the Supreme Court stated: "It is . . . plain that retroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. We hold, therefore, that our decision today shall apply only prospectively." 458 U.S. at 88, 102 S.Ct. at 2880.[3]

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[3] In its discussion of prospectivity, the Supreme Court cited *Buckley v. Valeo*, 424 U.S. 1, 142, 96 S.Ct. 612, 693, 46 L.Ed.2d 659 (1976). *See Northern Pipeline*, 458 U.S. at 88 n. 41, 102 S.Ct. at 2880 n. 41. *Buckley* involved the constitutionality of the Federal Elections Committee. The Supreme Court concluded that the Committee could not perform many of its legislative and adjudicative functions because the appointment process for Commission members failed to comply with the Appointments

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The question then arises whether the prospective application is limited to § 1471 jurisdiction, which the *Northern Pipeline* concurrence argues was the only issue before the Court, or includes the entire Bankruptcy Act and thus § 1481, which provides for the exercise of contempt powers by the bankruptcy judge.[4] The Second Circuit in *Martin-Trigona v. Shiff*, 702 F.2d 380, 384 n. 8 (2d Cir. 1983), was faced with this question in a similar civil contempt proceeding. The Second Circuit reasoned that when the Supreme Court stated its decision would apply only prospectively, the Court intended for the decision not to "affect bankruptcy court decisions pending on appeal before June 28, 1982, the date of the Supreme Court opinion." *Id.* (quoting *Barnes v. Whelan*, 689 F.2d 193, 196 n. 1 (D.C. Cir. 1982)). This included contempt proceedings.

We agree with the Second Circuit's reasoning. The full import of the Supreme Court's prospective decree is that prior to *Northern Pipeline*, the bankruptcy court was vested with plenary jurisdiction to act in accord with the congressional grant. The congressional grant included the

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Clause of the Constitution, Art II, § 2, cl. 2. The Court nevertheless accorded the past acts of the Committee de facto validity. The Sixth Circuit has interpreted the Court's citation to *Buckley* and general discussion on prospective application as precluding challenges to a bankruptcy court's pre-*Northern Pipeline* acts or final determinations. *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 258 (6th Cir. 1983). We agree. A decision holding a statute prospectively unconstitutional means that the statute is given de facto validity prior to the decision.

[4] Section 1481 does not expressly provide for contempt, but does give the bankruptcy court the powers of a court of law, equity, or admiralty. These powers are further defined in 18 U.S.C. § 401, which includes the power of contempt.

power of contempt. *See* 28 U.S.C. § 1481; 18 U.S.C. § 401. Were this reasoning not followed, pre-*Northern Pipeline* bankruptcy decisions would be subject to continuing ad hoc attacks on the various congressional grants of bankruptcy power under the Reform Act. The plurality opinion recognized this when it stated:

> In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, *and thus subject to Art. III constitutional challenge on a claim-by-claim basis.*

458 U.S. at 87 n. 40, 102 S.Ct. at 2880 n. 40 (emphasis added). We view this statement and the prospective application of *Northern Pipeline* as precluding challenges to pre-*Northern Pipeline* bankruptcy decisions "on a claim-by-claim basis."

This view is not altered by the *Northern Pipeline* concurrence. The position of the concurrence was that the decision should be limited to the constitutionality of § 1471. However, the concurring opinion joined the majority with respect to the prospective application, and we read this as incorporating the views we derive from the plurality decision regarding the preclusion of ad hoc challenges to pre-*Northern Pipeline* bankruptcy decisions.

In addition, we take judicial note of the fact that the Judicial Conference and the Judicial Councils, in passing interim rules to give the bankruptcy courts jurisdiction via the district courts, did so assuming that other provisions under the Reform Act would not survive. These

rules generally have been found constitutional. *See, e.g., Oklahoma Health Services Federal Credit Union v. Webb*, 726 F.2d 624, 625 (10th Cir. 1984); *In re Kaiser*, 722 F.2d 1574, 1581 (2d Cir. 1983); *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 263 (6th Cir. 1983). These interim rules presuppose that *Northern Pipeline* struck the entire Act, not just § 1471, and that the prospective application thus applies to the entire Act.[5]

We reach this conclusion cognizant of the fact that Congress is in the midst or reconstructuring the entire Bankruptcy Act. Whether the new Act may properly provide the bankruptcy courts with contempt power outside of Article III is of course not decided by either the district court in the decision below or the Supreme Court in *Northern Pipeline*.

[6] Having concluded that *Northern Pipeline* mandates a finding of a constitutionally valid contempt power in bankruptcy courts, we must still decide if this power is limited by Bankruptcy Rule 920, 411 U.S. 989, 1100, 93 S.Ct. 3095, 3171, 37 L.Ed.2d xxxiii, lxxix (1973).[6] This rule, prescribed by the Supreme Court, gave contempt

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[5] Ironically these rules, adopted by the district court in Arkansas, provide the bankruptcy court with contempt power. See Interim Rule (d)(1), General Order No. 24 (E.D.Ark. Dec. 20, 1982, amended April 2, 1984).

[6] The rule was passed by the Supreme Court pursuant to 28 U.S.C. § 2075, which provides:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11.

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power to bankruptcy courts[7] but imposed a $250 limit on fines. Section 1481, on the other hand, states: "A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28 U.S.C. § 1481.

The "powers of a court of equity, law, and admiralty" are defined in 18 U.S.C. § 401, which provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administrstion of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;

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> Such rules shall not abridge, enlarge, or modify any substantive right.
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

These rules have now been superseded by the new bankruptcy rules prescribed by the Supreme Court on April 25, 1983, effective August 1, 1983.

[7] The rules actually gave contempt powers to bankruptcy referees, who were officers of the district court. Prior to 1978, the "bankruptcy court" was the district court. It was not until the 1978 Bankruptcy Act that a bankruptcy court separate from the district court was created. The district court below provides an exceilent historical overview. See 24 B.R. at 939-41.

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

At least two district courts have read rule 920 as continuing to limit the contempt powers of bankruptcy courts even after the enactment of section 1481. *Horace v. Moore,* 24 B.R. 892 (D.C.N.D.Ill. 1982); *Martin-Trigona v. Shiff,* 19 B.R. 1001 (D.C.Conn. 1982). Several bankruptcy courts, on the other hand, have held that rule 920 is no longer applicable. *See, e.g., In re Stacy,* 21 B.R. 49, 52 (Bkrtcy. W.D.Va. 1982); *In re Gorin,* 18 B.R. 151, 153 (Bkrtcy.D. Conn. 1982); *In re Lowe,* 18 B.R. 20, 24 (Bkrtcy.N.D.Ga. 1981); *In re Eisenberg,* 7 B.R. 683, 690-91 (Bkrtcy.E.D. N.Y. 1980). *But see In re Pal Transport, Inc.,* 13 B.R. 935, 940 (Bkrtcy.M.D.Fla. 1981) ("Since the Code is silent on this subject, there is no question that Bankruptcy Rule 920 still applies and still carries forward the limitations placed on the bankruptcy judge's power to punish for contempt.").

[7] We agree with the majority of bankruptcy courts that rule 920 is no longer a limit to contempt power in view of section 1481.[8] Rule 920 was prescribed pursuant to 28 U.S.C. § 2075. Both the rule and the statute were enacted before 28 U.S.C. § 1481. If section 1481 is inconsistent with rule 920, section 1481 controls since it was enacted later in time. Moreover, section 405(d) of the Bankruptcy

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[8] *See also* 1 Collier on Bankruptcy, ¶ 301, at 3-109 (15th ed. 1979).

Reform Act also provides that section 1481 applies to the extent rule 920 is inconsistent.[9]

The power of contempt is not unlimited, however, even if the contempt exercised is within the statutory grant. It has a due process limitation "declared to be 'the least possible power adequate to the end proposed.'" *Marshall v. Gordon*, 243 U.S. 521, 541, 37 S.Ct. 448, 453, 61 L.Ed. 881 (1917) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 231, 5 L.Ed. 242 (1821)). The review by the district court therefore should have been limited to whether the contempt order was "the least possible power adequate to the end proposed," and whether the findings by the bankruptcy court were clearly erroneous. The district court here made a de novo review. On the strength of the prospective application of *Northern Pipeline*, we find this to be error. We thus vacate the district court decision and remand for a proper review consistent with this opinion.

Each party shall pay its own costs.

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[9] Section 405(d) provides:

> The rules prescribed under section 2075 of title 28 of the United States Code and in effect on September 30, 1979, shall apply to cases under title 11, to the extent not inconsistent with the amendments made by this Act, or with this Act, until such rules are repealed or superseded by rules prescribed and effective under such section, as amended by section 248 of this Act.

Pub.L. 95-598, § 405(d), 92 Stat. 2549, 2685 (1978). One district court has found this language not specific enough to override rule 920. *Martin-Trigona v. Shiff*, 19 B.R. 1001, 1002 (D.C. Conn. 1982). We disagree.

APPENDIX B

In re COX COTTON COMPANY d/b/a James Grain & Cotton Co., Debtor.

In re Don JAMES, Robert James and G. E. James, a general partnership, d/b/a Frisbee Cotton Company; James Grain & Elevator, Debtor.

Robert P. LINDSEY, Trustee,

Plaintiff,

v.

Mrs. Wayne CRYTS a/k/a Sandy Cryts; William Cryts, Jr.; Evans Ipock; Bill Jewell; and Wayne Cryts,

Defendants.

Mrs. Wayne CRYTS a/k/a Sandy Cryts; William Cryts, Jr.; Evans Ipock; Bill Jewell; and Wayne Cryts,

Appellants,

v.

Robert P. LINDSEY, Trustee,

Appellee.

Bankruptcy Nos. J-80-154-B, J-80-155-B.
Adv. No. 800414.

United States District Court,
E.D. Arkansas,
Jonesboro Division.

Nov. 17, 1982.

MEMORANDUM OPINION

EISELE, Chief District Judge.

Pending before the Court is an appeal from a judgment for civil contempt and a certification for criminal contempt entered on June 2, 1982, by Judge Baker of the United States Bankruptcy Court for the Eastern District of Arkansas. The judgment and certification arise out

of a complex series of proceedings involving the Cox Cotton Company bankruptcies. The detailed facts surrounding those proceedings and the events leading up to the contempt order can be found elsewhere. *See State of Missouri v. United States Bankruptcy Court,* 647 F.2d 768, 771-74 (8th Cir.1981); *Re: Contempt of Phillip Wayne Cryts, et al.,* AP 80-414 (Bankr.E.D.Ark. July 7, 1982) (memorandum opinion of Judge Baker). For purposes of this appeal the Court will present only a brief background of the facts pertinent to this proceeding.

Background.

The bankruptcy petition relevant to this case was filed on August 11, 1980, by the debtors who operated a number of grain elevators, one of which was located in Ristine, Missouri. A trustee, Robert Lindsey, was immediately appointed and given authority to operate the business. On September 23, 1980, he requested authority to sell all the debtors' grain free and clear of all liens and interests. That touched off a storm of protest among the Missouri farmers whose grain was stored in the debtors' elevators. Their actions included barricading entrances to the Ristine elevator, which resulted in United States marshals being assigned there. The principal questions were: who actually owned the grain or quantities thereof in those elevators; how much grain was stored in them; and whether the State of Missouri should be appointed as the proper receiver under the circumstances. The latter issue prompted Missouri and a number of its state agencies to file various actions in federal court in an attempt to obtain jurisdiction over the "Missouri grain." This culminated in a finding by the Eighth Circuit Court of Appeals, in April

of 1981, that the federal bankruptcy court had exclusive jurisdiction over debtors' Missouri property, including the grain. *See State of Missouri,* 647 F.2d at 774.

Before that ruling, however, Wayne Cryts and others, on or about February 16, 17 and 18, removed from the debtors' Ristine, Missouri, elevator approximately 31,000 bushels of soybeans. This was done in the presence of the U.S. marshals and the FBI, and involved a convoy of some 77 trucks to transport the soybeans. The beans were taken to a Missouri Farmers Association (MFA) elevator in Bernie, Missouri. Through an order on February 18, 1981, the court of appeals declared that the jurisdictional rights in that grain were expressly reserved to the trustee until that court could resolve jurisdictional issues regarding the debtors' Missouri property.

Following the court of appeals' decision in April on the jurisdictional issue, the bankruptcy court on May 27, 1981, authorized the trustee to sell the "Missouri grain," including the 31,000 bushels in the Bernie, Missouri, elevator. Again, the local farmers became upset and on a number of occasions barricaded the entrances to the Ristine elevator. The significant event, and the one which ultimately led to this appeal, occurred on or about July 22, 1981, when Wayne Cryts and the other appellants, in the early hours of the morning, removed the soybeans from the Bernie elevator and took them to parts unknown. Consequently, the trustee filed his motions for civil contempt proceedings.

During the fall of 1981, the bankruptcy court had difficulty assembling all the parties for an adversary hearing on the contempt motions, and it was not until February 9,

1982, that the first such hearing was held. On that date Wayne Cryts took the witness stand and invoked his Fifth Amendment privilege against self-incrimination when asked who helped him remove the grain from the Bernie elevator, where the grain was taken, and how the grain was disposed of. Judge Baker adjourned the hearing until it could be determined if Wayne Cryts might be granted use immunity in exchange for his testimony. That immunity was granted by this Court on April 1, 1982. Judge Baker reconvened the hearing on April 28, 1982, but Wayne Cryts again refused to answer the trustee's questions. Judge Baker immediately jailed the appellant for civil contempt. On June 1, 1982, appellant was released from jail on the order of Judge Baker because he had come to a decision on the trustee's motion for contempt. The judgment on that motion was entered on June 7, 1981, and the appellants were found to be in civil contempt and were held jointly and severally liable for the sum of $287,708.73 plus $1,500 per day for each day the judgment remained unsatisfied. The amount of the judgment was based on the value of the soybeans taken and the trustee's costs in bringing the contempt action. Judge Baker also certified to this Court a criminal contempt for each appellant. This appeal was then taken.

The Court will first resolve the issues before it with respect to Wayne Cryts. Mr. Cryts presents his claims on three levels: First, the entire Bankruptcy Code is unconstitutional; second, assuming the Code to be constitutional, the contempt provisions of the Code are unconstitutional; and, third, assuming the contempt provisions to be constitutional, the finding of civil contempt as to him was unconstitutional because, under the facts and circumstances

of this particular situation, the bankruptcy court lacked jurisdiction over the 31,000 bushels of soybeans in the Bernie Elevator.

* * *

Constitutionality of Bankruptcy Judge's Contempt Powers.

The appellant argues that the contempt power exercised by Judge Baker is unconstitutional. The appellee disagrees and contends that the broad grant of contempt powers to the bankruptcy judges under the 1978 Code is constitutional. He further argues that the contempt power has always been recognized as a power inherent in both the judge and the court of bankruptcy.

In order to appropriately deal with these issues, it is necessary to develop a historical perspective. A concise summary of the development of the bankruptcy system from the time of the enactment of the Bankruptcy Act of 1898 is found in the legislative history of the 1978 Code.

> The system as it operates today was not enacted in its present form. It has evolved over the past 80 years from a far different system. In 1898, when the Bankruptcy Act was enacted, referees were not salaried officers of the United States. They were appointed for 2-year terms, paid on a commission (fee) basis, and not used as extensively as they are under present law. The reference of a bankruptcy case was not automatic; the referees' orders were not given the same finality as under present law; and review of referee's decisions and orders by district judges was by "petition for review" rather than by appeal.
>
> Referees originally were required to perform many purely ministerial functions; their judicial role

was minor. The referee was not conceived of as a judge or a judicial officer, but rather as a supervisor and administrator of a bankruptcy case. His judicial functions grew from his role of administering an estate: when disagreements arose in the administration of a case, he would decide them, subject to review by the district court. Though the administration of a bankruptcy case was entrusted to a nonjudicial officer, most of the litigation that arose in bankruptcy cases in 1898 was entrusted to Federal district or State courts. The referees only decided those matters relating to property over which they had direct control, matters referred to them as special masters by judges, and matters submitted by consent of the parties. The Act vests jurisdiction "of all controversies at law and in equity, as distinguised from proceedings in bankruptcy," in the courts in which the matter in dispute would have been decided in the absence of bankruptcy.

Beginning in 1938, the position of referee began to change. The Chandler Act made the referee more of a judicial officer. It removed many of the referees' administrative duties and lodged them elsewhere, either in the trustee or the clerk. In 1946, referees were removed from the fee system and made salaried officers of the district courts. The universally deplored fee system, which gave referees an incentive to decide disputes in favor of the estate, was repealed in view of the referee's expanded judicial and diminished administrative role. When the referee was acting as a collection officer, a fee system was acceptable. When he became a judicial officer, a fee system was wholly out of place, and possibly unconstitutional. The 1946 legislation also extended the terms of referees from 2 to 6 years. Legislation in 1966 prohibited referees from acting as trustees or receivers in bankruptcy cases, an inappropriate activity for a judicial officer.

In 1973, the Rules of Bankruptcy Procedure, promulgated by the Supreme Court on the recommendation of the Judicial Conference, went further to recognize the judicial status of referees. The title of the office was changed to bankruptcy judge. The jurisdiction over disputes was defacto expanded by a clarification of what constituted consent to jurisdiction by an adverse party. More of the bankruptcy judge's administrative duties were removed from him. The thrust of the Bankruptcy Rules, more than any change in the preceding 40 years, was to recognize the judicial character of the office of bankruptcy judge, and the primary judicial nature of the work the bankruptcy judge performs and the contact creditors and debtor alike have with the bankrutcy judge. In the words of the Judicial Conference's Advisory Committee on Bankruptcy Rules:

> [t]here has been a purpose to emphasize the judicial in contradistinction to the ministerial functions of the referee in bankruptcy administration and to enhance the dignity of the office as that of the principal judge of the bankruptcy court.

The result of these developments in the law has been to recognize the bankruptcy judge as a regular judicial official that handles only bankruptcy cases. Thus, bankruptcy judges today comprise a de facto specialized court system within the district courts. District judges become involved very little in the administration of or decisions in bankruptcy cases. Approximately 190 full-time and 30 part-time bankruptcy judges throughout the country handle the approximately 250,000 cases now pending in the courts with little direct supervision from the district judges.

As the system has evolved, district judges have removed themselves further and further from the consideration of bankruptcy matters. The area has become too specialized and requires too much exper-

> tise to be able to be handled on an ad hoc basis by a generalist. The district court bench has generally recognized this fact and left bankruptcy matters to the bankruptcy judges. The only control the district judges still retain is in the appointment and removal process, in hearing appeals of bankruptcy judges' decisions, and in the exercise of certain powers reserved to the district courts by statute [power to enjoin another court (11 U.S.C. 11a(15)); *power to punish for contempt* (11 U.S.C. 11a(16), 69)].

H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 8-9 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 5969-5971 (footnotes omitted) (emphasis added). *See also* Merrick, *Constitutional Chaos: Rodrock v. Security Industrial Bank,* 2 N.Ill.U.L.Rev. 167 (1982) (giving a detailed history of the development of bankruptcy law).

This brief history clarifies certain aspects of the bankruptcy system that are critical to a proper understanding of the case law addressing the issue of the contempt powers of the "bankruptcy court" prior to the 1978 Code. The "bankruptcy court," prior to the 1978 Code, was the federal district court. Until the 1978 Code, there was never in existence a "court of bankruptcy" independent of, or separate from, the federal district court. The "bankruptcy judge," prior to the adoption of the 1973 Rules, was the district court judge. The administrative officer who became titled "bankruptcy judge" under the 1973 Rules had theretofore always been called a "referee." In sum, the *jurisdiction* to resolve bankruptcy matters, prior to the 1978 Code, was vested in the federal district court *as the bankruptcy court.* The referee in bankruptcy, made "judge" by court Rule after 1973, was an officer of the district court and functioned

like a special master in the early years and similar to a magistrate in the later years prior to the 1978 Code. With these clarifications and distinctions in mind, an analysis of the case law that deals with the contempt power of the "bankruptcy court" can more readily and understandably be made.

The seminal case recognizing the existence of the contempt power in the "bankruptcy court" is *Boyd v. Glucklich,* 116 F. 131 (8th Cir.1902). Although cited by the appellee, courts and legal treatises for the proposition that the "bankruptcy court" is possessed of broad inherent contempt powers, a careful reading of the case shows that it hurts, rather than helps, appellee's position here. In *Boyd* the referee ordered the defendant to turn over certain property to the trustee. The defendant appealed to the district court, which upheld the referee's order and further ordered the defendant to turn over the property in ten days or be jailed for contempt. The court of appeals reversed because of due process problems regarding the initial determination of whether the trustee was entitled to the defendant's property. In doing so, however, the court addressed the issue of the contempt power of the "courts of bankruptcy."

> Frequent reference is made to section 41 of the bankrupt act, as though that act invested courts of bankruptcy with broader and larger powers to punish for contempt than is possessed by other United States courts. It does nothing of the kind. This section does not in express terms confer on the court of bankruptcy the power to puuish for contempt. But no such enactment was necessary. The moment the court was called into existence it became possessed of this power by the operation of the common law, as well as by section 725 of the Revised Statutes

of the United States. *The reference to the power to punish for contempt in section 41 of the bankrupt act was not to confer the power on the court of bankruptcy,* for its creation alone invested it with the power, *but it was to make it plain that the power was not conferred on referees in bankruptcy,* and to confer it on the "judge" of the court of bankruptcy, who could not exercise the power in the absence of the statute expressly conferring it. This is done by section 41b, in these terms:

> "(b) The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy. * * *

By reference to section 41 it will be seen that "the things forbidden in this section," concerning which the referee is required to certify the facts to the judge include only those things which would be punishable as contempts by all courts of record. They are the common and familiar heads for the exercise of this jurisdiction by all courts of record. No new or enlarged jurisdiction is conferred, and no power to impose a punishment which might not rightly and lawfully be im posed, on a similar state of facts, by any other United States court. Any act, matter, or thing which any United States court may punish as a contempt may be punished as such by a court of bankruptcy; and any act, matter, or thing which cannot be punished as a contempt by other United States courts cannot be punished as such by a court of bankruptcy. Moreover, the mode of proceeding in a court of bankruptcy to determine whether a constructive contempt has been committed should conform to the established practice in like cases in all other United States courts as near as may be, and

> what is legally sufficient to purge a contempt in the other courts of the United States is sufficient to purge the like contempt in a court of bankruptcy.

Id. at 135 (emphasis added).

The *Boyd* decision, therefore, stands for the proposition that when the federal district court, an Article III court, was vested with bankruptcy jurisdiction, and then acted in its capacity as the "court of bankruptcy," it became inherently vested with the power of contempt to deal with bankruptcy matters. That power was not exceeded by finding a contempt where the contemptuous behavior occurred before the referee and the referee certified those facts to the district court judge. The *Boyd* case cannot be read as supporting the proposition that the "bankruptcy court" of the 1978 Code, an entity "separate" from the district court, has inherent contempt powers. Following *Boyd,* those cases where the "bankrutcy court" imposed contempt sanctions show that the power was actually exercised by a judge of a United States District Court. *See, e.g., Morehouse v. Giant Powder Co.,* 206 F. 24 (9th Cir.1913) (fine for disposing of bankrupt's property upheld); *In re Fortunaxo,* 123 F. 622 (S.D.N.Y. 1903).

The *Boyd* case and decisions subsequent to it are also clear in holding that the referee, at least prior to the adoption of the 1973 Rules, had no power to punish for contempt. Only the district court judge, acting in his capacity of judge of the bankruptcy court had that power. *In re Rubin,* 378 F.2d 104 (3d Cir.1967); *O'Hagan v. Blythe,* 354 F.2d 83 (2d Cir.1965); *In re Haring,* 193 F. 168, 170-73 (W.D.Mich.1912), *aff'd,* 203 F. 229 (6th Cir.), *cert. denied,* 229 U.S. 621, 33 S.Ct. 1049, 57 L.Ed.

1355 (1913). The applicable statute required the referee to certify to the district judge the facts giving rise to the alleged contempt. 11 U.S.C. § 69(b). In sum, it is conclusive that until the adoption of the 1973 Rules, the power of contempt in bankruptcy proceeding was vested exclusively in the district court judge acting in his capacity as judge of "the bankruptcy court," which court was in fact the United States District Court.

In 1973, the United States Supreme Court adopted the Rules of Bankruptcy Procedure. 411 U.S. 989, 93 S.Ct. 3081, 37 L.Ed.2d xxxi (1973). For the first time the bankruptcy referees (called "bankruptcy judges" thereunder) were granted a limited power of contempt pursuant to Rule 920. The essence of that rule is that a referee could punish both civil and criminal contemptuous behavior prohibited by 11 U.S.C. § 69(a)(2) by imposing a fine of not more than $250. If the referee believed the contemptuous behavior warranted imprisonment or a fine greater than $250, he was required to certify the facts to the district judge for disposition. The rationale for this limited power of contempt was expressed in the Advisory Committee's Note accompanying Rule 920.

> Paragraph (4) of subdivision (a) of this rule retains for all but minor contempts the certification procedure of § 41b of the Act [section 69(b) of this title]. If it appears to a referee that conduct in proceedings before him may warrant imprisonment or a fine of more than $250, the referee should proceed under this paragraph. The referee may proceed under paragraph (1) or (2) of the subdivision to determine and punish conduct prohibited by § 41a of the Act [section 69(a) of this title], but paragraph (3) limits the punishment that can be meted out by the referee to a fine of not more than $250. The premise of the change in procedure for dealing with minor

> contempts is that the certification requirement of § 41b of the Act [section 69(b) of this title] has in effect deprived the referee of the necessary power to protect proceedings before him from petty disturbances and acts of disobedience because of the inordinate inconvenience entailed by the statutory procedure for the judge and the referee.

Rule 920 was not adopted without criticism. Justice Douglas voiced a strong dissent: "Extension of the contempt power to administrative arms of the bankruptcy court is not consistent with the close confinement of the contempt power.... I would not extend the contempt power to bankruptcy referees." 411 U.S. at 994, 93 S.Ct. at 3083, 37 L.Ed.2d xxxii. As Justice Douglas also pointed out, the issue of referees exercising the contempt power had never come before the Court. *Id.* It is also clear that the issue, in a constitutional "case and controversy" context, has never been—even until the present date—addressed by the United States Supreme Court.

Following the adoption of Rule 920, and prior to the 1978 Code, the referee's new power of contempt was noted by five appellate courts, but its constitutionality was never expressly addressed. *See In re Lahm Industries, Inc.,* 609 F.2d 567 (1st Cir.1979) (baukruptcy referee certified facts to district court pursuant to Rule 920, but finding of contempt by district court was reversed for procedural infirmities); *In the Matter of Baum,* 606 F.2d 592 (5th Cir.1975) (referee imposed $250 fine for contempt but court reversed because conduct found not contemptuous); *Fernos-Lopez v. United States District Court,* 599 F.2d 1087 (1st Cir.), *cert. denied,* 444 U.S. 931, 100 S.Ct. 275, 62 L.Ed.2d 189 (1979) (power of referee under Rule 920 upheld but reversed contempt

finding for failure to follow Rule 920 procedures properly); *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47 (2d Cir.1976) (court upheld contempt for automatic stay violation entered by district court pursuant to referee's certification of facts under Rule 920); *Block v. Consino*, 535 F.2d 1165 (9th Cir.1976) (referee's certification of facts to district court for contempt order without first holding a hearing before referee held proper under Rule 920).

The federal district courts that heard cases involving Rule 920 likewise never addressed its constitutionality, but seemed to accept its legitimacy. *See In the Matter of Bon Voyage Travel Agency*, 449 F.Supp. 250 (N.D.Ill. 1978); *United Merchants and Manufacturers, Inc. v. Goldenberg*, 447 F.Supp. 918 (N.D.Tex.1978); *In the Matter of Verran*, 40 AFTR2d 77-5124 (E.D.Mich. 1977); *Ben Hyman & Co. v. Fulton Nat'l. Bank*, 423 F.Supp. 1006 (N.D.Ga.1976); *Preferred Surfacing, Inc. v. Gwinnett Bank & Trust Co.*, 400 F.Supp. 280 (N.D.Ga.1975); *In re Shelor*, 391 F.Supp. 384 (W.D.Va. 1975).

The passage of the Bankruptcy Reform Act of 1978 brought with it a broad expansion of the contempt power of the bankruptcy referee, now "bankruptcy judge." Two provisions of the 1978 Code vest the bankruptcy judge with those powers. Title 11 U.S.C. § 105(a) states:

> The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

Title 28 U.S.C. § 1481 states:

> A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt

> not committed in the presence of the judge of the court or warranting a punishment of imprisonment.

It is reasonable to conclude, as far as these statutes are concerned, that the bankruptcy judge may now exercise the power of contempt to the same extent as the district court judge may, with the exception regarding the criminal contempt power. It is also clear that the bankruptcy judges can exercise their new contempt powers at this time, although the effective date of section 1481 is April 1, 1984. *See* Pub.L. 95-598, Title IV, § 405, Nov. 6, 1978, 92 Stat. 2686.

As with the limited contempt powers conferred under Rule 920, the courts have not addressed the constitutionality of the expanded contempt powers of the bankruptcy judge. However, the question of whether Rule 920 remains as the applicable standard for the exercise of the contempt power in light of section 1481 has been addressed.

With respect to the latter issue, the United States District Court for the Northern District of Illinois in *Horace v. Moore,* 24 B.R. 892 (N.D.Ill.1982), seems to be of the opinion that the broad power under section 1481 is limited by Rule 920.

> The plaintiff has filed a motion to enforce an order of the Bankruptcy Judge Hertz which recommended that the bankrupt Henry B. Moore be fined $1,066 and evicted from property known as 3008 Greenwood Road, Hazelcrest, Illinois. The appeal is taken because a bankruptcy judge can impose a fine of only $250 for contempt under Rule 920(a)(4). Upon certification of the contempt order to this court, we are empowered under the Rule to proceed as though the contempt was committed here.

The district court then held the plaintiff in contempt on its own authority. In another case from that same district, *In re Bazan*, No. 80-C-6789 (N.D.Ill. Aug. 6, 1981) (slip op. of Judge Aspen), the court simply noted that the bankruptcy judge's contempt fines of $100 and $150 were within his power, citing both Rule 920 and section 1481. However, the appellants' conduct was held not contemptuous.

The bankruptcy courts have been inconsistent in construing Rule 920 with section 1481. Some appear to have adopted the position that, to the extent that rule 920 is inconsistent with section 1481, the later controls. *In re Eisenberg*, 7 B.R. 683, 691 (Bkrtcy.1980) ("Thus, to the extent that Fed.R.Bankr.P. 920(a)(3) places a $250 limitation on the power of bankruptcy judges to fine as punishment for civil contempt or criminal contempt in his presence, it is inconsist with the Bankruptcy Reform Act and is of no further force and effect. See Bankruptcy Reform Act section 405(d)"). *Accord In re Stacy*, 21 B.R. 49 (Bkrtcy.W.D.Va.1982). Where section 1481 is found to control, some bankruptcy courts have applied it with vigor. *See In re Myers*, 18 B.R. 362 (Bkrtcy.E.D.Va.1982) ($10,000 fine for violating a discharge injunction); *In re Martin-Trigona*, 16 B.R. 792 (Bkrtcy.D.Conn.1982) (bankruptcy judge jailed debtor for contempt without certifying facts to district court); *In the Matter of Lowe*, 18 B.R. 20 (Bkrtcy.N.D.Ga.1981) (contempt power used to suspend attorney from practice before bankruptcy court). A significant number of bankruptcy judges, however, apparently find Rule 920 to be a limitation on their section 1481 powers. *See In re Mealey*, 16 B.R. 800 (Bkrtcy.E.D.Pa.1982) (court imposed

$250 fine following Rule 920(a)(3) without considering section 1481); *In re Norton,* 15 B.R. 623 (Bkrtcy.E.D.Pa. 1982) (court fined IRS $150 following Rule 920(a)(3)); *In re Mantolesky,* 14 B.R. 973, 979 (Bkrtcy.D.Mass.1981) ("Bankruptcy Rule 920 specifies the limits of the court's contempt power. . . ."); *In the Matter of Pal Transportation, Inc.,* 13 B.R. 935 (Bkrtcy.M.D.Fla.1981); *In re Kings Row Fireplace Shops of Rivergate,* 1 B.R. 720, 722 (Bkrtcy.M.D.Tenn.1979) ("Pursuant to Bankruptcy Rule 920(a)(3) this court may not impose a fine of more than $250 as punishment for any contempt, civil or criminal.").

Few courts have made mention of the more fundamental issue: whether the "bankruptcy court" under Rule 920 or as constituted under the 1978 Act can constitutionally be empowered to punish for contempt. Those cases that have addressed the contempt power of the bankruptcy court usually contain a general statement that such a power is "inherent in all courts" and therefore is inherent in the bankruptcy court established under the 1978 Code. Each such case then cites *Boyd v. Glucklich* as the authority for such conclusion. *See, e.g., Fernos-Lopez v. United States District Court,* 599 F.2d at 1090 (upholding power of the "bankruptcy court" (i.e. district court) to punish contempts done in front of referee when certified to district court pursuant to Rule 920); *Ben Hyman & Co. v. Fulton Nat'l. Bank,* 423 F.Supp. at 1011 (addressing power of referee to impose $200 penalty for contempt under Rule 920); *Preferred Surfacing, Inc. v. Gwinnett Bank & Trust Co.,* 400 F.Supp. at 284-85 (addressing fine of $200 imposed by referee under Rule 920); *In re Reed,* 11 B.R. 258, 261 (Bkrtcy.D.Utah1981) (In justifying the contempt powers under the 1978 Code, the bankruptcy judge held that: "It was early deter-

mined that bankruptcy courts, as courts of equity, even without statutory authorization, possessed this power.'') (citing *Boyd*).

The difficulty encountered in using these cases, particularly *Reed,* as precedent for the constitutionality of a referee's contempt power under Rule 920, or a bankruptcy judge's contempt power under sections 105 and 1481, is the logical non-sequitor (discussed *supra*) presented in each of these cases. Recall that *Boyd* held simply that the district court, when constituted as the bankruptcy court, was vested with the power of contempt over bankruptcy matters. These cases, in applying *Boyd*, appear to be victims of a semantic and historical confusion. This is because each appears to view the bankruptcy court, as it existed subsequent to the adoption of the 1973 Rules but prior to the 1978 Code, as an entity separate from the district court. Functionally this may have been true, but in a statutory, legal sense it was not. The referee in *Boyd* may have been given the title "judge" in 1973, but the bankruptcy court was still the district court, and remained so, until the 1978 Code was enacted. Therefore, any "inherent power of contempt," of which the pre-1978 Code cases spoke, could only have existed in the United States District Court. What limited powers of contempt that appear to be vested in the referee (or "bankruptcy judge") by Rule 920 exist only by virtue of that Rule's being adopted by the Supreme Court.

With the enactment of the 1978 Code, however, there was created a different entity called the "bankruptcy court" that probably is intended to exist separately from the district court. But, if so, that new "court" could not "inherit" contempt powers of the district court solely by

virtue of the fact that it was once one and the same as that court. Rather, if the bankruptcy court and its judges have any contempt power at all under the 1978 Code, that grant of authority must have a constitutional basis.

[6] The issue squarely before this Court, then, is a novel one. The trustee's assertions to the contrary, neither *Boyd* nor the subsequent case law quoting it is controlling on the question of whether the power of civil contempt vested in the bankruptcy judge under the 1978 Code is constitutional. A careful and more searching inquiry is therefore necessary.

It is also noted at the outset that only the civil contempt power and the power to fine for criminal contempts committed in the presence of the bankruptcy judge are at issue here, since the 1978 statute prohibits the bankruptcy judge from punishing for a criminal contempt not committed in his presence or for a criminal contempt warranting a punishment of imprisonment. 28 U.S.C. § 1481.

This Court's analysis of the contempt power of the bankruptcy court will proceed along a number of lines. First is the question of the contempt power itself: in the federal system, is it inherent in all courts or only courts established pursuant to Article III of the Constitution? Because the new bankruptcy courts are not Article III courts (even though, perhaps, they may be "adjuncts" of such courts), the question arises whether Congress has the authority to vest in them the contempt power. Critical to the analysis is what "type" of court the new bankruptcy court is, and whether the contempt power is a "judicial power" that Congress may only vest in Article III courts, the courts authorized by the Constitution to exercise the "judicial power of the United States."

The power of a court to punish for contempt is one of necessity.

> We start with the premise that the right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government and that courts necessarily must possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions.

Wood v. Georgia, 370 U.S. 375, 383, 82 S.Ct. 1364, 1369, 8 L.Ed.2d 569 (1962). Nevertheless, the contempt power

> can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes.

Ex parte Robinson, 86 U.S. (19 Wall.) 505, 511, 22 L.Ed. 205 (1873). The source of the contempt power appears to be undisputed.

> The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

Id. at 510. In a definitive statement on the power of contempt, the Supreme Court stated:

> That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress (*Ex parte Robinson* [86 U.S.], 19 Wall. 505, 510-511, 22 L.Ed. 205; *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 326, 24 S.Ct. 665 [666], 48 L.Ed. 997); but the attributes which inhere in that power and are

> inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted.

Michaelson v. United States, 266 U.S. 42, 65-66, 45 S.Ct. 18, 19-20, 69 L.Ed. 162 (1924). The contempt power of the federal courts is set out in 18 U.S.C. § 401, which states as follows:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

From the foregoing, a clear rule emerges: the contempt power is inherent in the "courts" of the United States, but the power is subject to limited regulation by Congress. This Court is then left with two fundamental questions: (1) does the contempt power that inheres in these courts flow from the "judicial power" of Article III, that is, does it arise by the mere creation of a "court" of the United States or does it arise by specific Congressional fiat; and (2) does the term "court" of the United States found in the case law and statutes include the "court of bankruptcy" as it exists today under the 1978 Act?

It would seem that because Congress can place some limits on the contempt power, it does not necessarily follow that Congress can also make a grant of that power outside of the confines of Article III. If that were so,

Congress could vest the contempt power in any decision-making body it chose to term a "court" or even in agencies it did not choose to call "courts." An early and precise answer to this question was given in an often quoted opinion of the Eighth Circuit Court of Appeals.

> The power of the national courts to enforce obedience, and to punish disobedience, of their orders, *is not derived from the acts of congress* (Rev.St. § 725), *but from the grant to them of all the judicial power of the nation by section I of article 3 of the constitution,* which declares that "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish." The grant of the judicial power of the United States to these courts ex vi termini vested them with authority to enforce obedience to their orders and to punish disobedience and contempt of their authority by fine and imprisonment, because this authority is an attribute of judicial power as inherent and indispensable as a judge.

In re Nevitt, 117 F. 448, 455 (8th Cir. 1902) (emphasis added). *See also Ex parte Hudgings,* 249 U.S. 378, 383, 39 S.Ct. 337, 339, 63 L.Ed. 656 (1919) (the contempt power exists "within the limits of and [is] sanctioned by the Constitution. . . ."). This statement clearly shows that Congress cannot freely confer the contempt power. It must first vest the "judicial power of the United States" (of which the contempt power is a necessary attribute) in some "inferior court." It may then, within narrow limits, restrict and regulate the use of such inherent contempt powers. *See Michaelson v. United States,* quoted *supra.* But the grant of such powers is exercised by the Congress through its power to "ordain and establish" inferior courts under Article III. From this analysis it would then fol-

low that if a court, created by an act of the United States Congress, is not established pursuant to Article III, it could not possess the contempt power. The Court believes this proposition to be an accurate statement of the current status of constitutional law on this issue. Nevertheless, the underlying rationale for this rule must be explored to fully understand its ramifications.

This Court is aware of the cases, beginning with *American Insurance Co. v. Canter,* 26 U.S. (1 Pet.) 511, 7 L.Ed. 242 (1828), and up to *Palmore v. United States,* 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973), which have addressed the authority of Congress to establish courts other than by use of the Article III power. In none of those cases, however, did the Supreme Court deal with the issue whether a non-Article III court could be vested with the contempt power or some portion thereof. Nevertheless, the limitations on Congress to vest the judicial power of Article III in non-Article III courts has been made clear. Chief Justice Marshall set down the rule in the *Canter* case when he addressed the authority of Congress to vest the judicial power in the Territorial Courts.

> These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.

Canter, 26 U.S. at 546.

Clearly then *Canter* and its progeny stand for the proposition that at least certain attributes of the "judicial power" may not be freely vested in non-Article III courts. The precise limits on which attributes of that power Congress can properly vest in non-Article III courts is not amenable, however, to a simple answer or statement. Rather, this Court must look at the constitutional genesis of the bankruptcy court under the 1978 Code in determining whether that court is capable of receiving the "judicial power of the United States" of which the contempt power is an attribute.

To begin, the bankruptcy court is clearly not an Article III court, although the House version of the bill would have had it so constituted. *See* H.R. 8200, 95th Cong. 1st Sess. (1977). When and if the Code goes into full effect in 1984, the judges of the bankruptcy court will be appointed by the President subject to Senate confirmation, will serve fourteen-year terms, will receive a salary that is subject to adjustment, including reduction, will be subject to removal from office for conduct less than that amounting to "high crimes and misdemeanors," and will be subject to disciplinary action by federal judges. *See* 28 U.S.C. §§ 152-154. Clearly the salary and tenure provisions of Article III are not met. The Code itself characterizes the bankruptcy court as an "adjunct" to the district court. 28 U.S.C. § 151(a). The Supreme Court in *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, — U.S. —, 102 S.Ct. 2858, 2867 n. 13, 73 L.Ed.2d 598 (1982), noted this language in the statute and the relevant legislative history, and determined that: "Congress did not constitute the bankruptcy courts as legislative courts."

However it is characterized, as an adjunct to the district court or as a legislative court, this Court finds that the bankruptcy court cannot be vested with the full power of civil contempt that is implicitly authorized in 28 U.S.C. § 1482 and 11 U.S.C. § 105. This conclusion follows from the predicate that a non-Article III court cannot be vested with the broad "judicial power of the United States" of which the contempt power is a non-severable attribute.

There are a number of reasons for this. To allow the contempt power to be vested in a non-Article III court would conflict with the doctrine of separation of powers, disregard the awesome nature of the contempt power itself, subvert its inherently judicial character, and seriously undermine the fundamental policies which underlie Article III.

Under the Constitution and its scheme for the allocation of power to the three branches of government, the framers recognized the need for the vesting of certain powers in one branch to the exclusion of the others. In Federalist No. 48 Madison wrote:

> It is agreed on all sides that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.

In Federalist No. 47 he also wrote:

> [W]here the *whole* power of a department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.

That principle was echoed in an early case, *Kilbourn v. Thompson,* 103 U.S. 168, 26 L.Ed. 377 (1881), which addressed the authority of Congress to exercise the contempt power: "it also remains true, as a general rule that the powers confided by the Constitution to one of these departments [branches] cannot be exercised by the other." *Id.* at 191. Although the *Kilbourn* case held that Congress *qua* Congress could exercise the power of contempt (see *infra),* that limited authority is a far cry from Congress being able at its whim to vest the power in other bodies. This Court sees the contempt power as "inherently judicial," and a power that is part of the uniqueness of the judiciary as a separate branch of government. *See Levine v. United States,* 362 U.S. 610, 616, 80 S.Ct. 1038, 1042, 4 L.Ed.2d 989 (1960) (contempt is a "power 'absolutely essential' for the functioning of an independent judiciary.").

There is also no doubt that Congress can impose limitations on the judicial power of contempt, but the power itself can "neither be abrogated nor rendered practically inoperable." *Ex parte Robinson,* 86 U.S. at 510. If Congress could vest the contempt power freely in any body it so chose, the judicial nature of the power would clearly be abrogated and the judicial branch of the government would likewise be subverted. The Constitution is clear that if Congress wishes to vest the "judicial power of the United States" it must do so under the terms of Article III. In that way only can the doctrine of separation of powers be preserved.

The trustee disagrees with this proposition and argues that, because the Supreme Court has recognized that the Houses of Congress possess the power to punish for

contempt, any tribunal to which they delegate their legislative powers would necessarily inherit the contempt power. This conclusion is without merit. A review of the cases relied upon by the trustee shows that the contempt power of Congress is extremely limited. *Jurney v. MacCracken,* 294 U.S. 125, 147, 55 S.Ct. 375, 378, 79 L.Ed. 802 (1935) ("It is true that the scope of the 'contempt' power is narrow. No act is so punishable unless it is of a nature to obstruct the performance of the duties of the legislature."); *McGrain v. Daugherty,* 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927) (contempt power of Senate recognized when used to enforce its power of inquiry); *Marshall v. Gordon,* 243 U.S. 521, 546, 37 S.Ct. 448, 455, 61 L.Ed. 881 (1917) (noting a boundary line which "separates the limited implied power to deal with classes of acts as contempts for self-preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts."); *In re Chapman,* 166 U.S. 661, 17 S.Ct. 677, 41 L.Ed. 1154 (1897) (court recognized power of Senate to use contempt to compel testimony before it); *Kilbourn v. Thompson,* 103 U.S. 168, 197, 26 L.Ed. 377 (1881) ("But we do not concede that the Houses of Congress possess this general power of punishing for contempt. The cases in which they can do this are very limited. . . ."); *Anderson v. Dunn,* 19 U.S. (6 Wheat.) 204, 231, 5 L.Ed. 242 (1821) (recognizing the power of Congress in its "self-preservation" capacity to imprison for contempt, but such imprisonment had to terminate with legislative adjournment). Moreover, the Supreme Court has held that the power of contempt is not an inherent attribute of Congress as a legislative body, but may be exercised by Congress only because the Constitution permits it. *Kilbourn,* 103 U.S. at 189.

From these cases the general principal emerges that Congress has a power of contempt permitted by the Constitution, but that power is limited to special circumstances in which Congress *itself* must effectuate its own preservation as an entity. There is nothing in these cases to suggest that Congress has some inherent power of contempt because it is a legislative body, nor that it can in any way delegate this contempt power. In fact, quite the contrary appears to be the case. Because Congress cannot vest its own limited power of contempt in other bodies of government, to do so it must return to Article III for both the source of the contempt power and the authority to vest it as part and parcel of the judicial power of the United States. And that judicial power can be vested only in an Article III court.

There are sound reasons for reserving the judicial power of contempt to courts constituted under Article III. First and foremost is the awesome nature of the power to imprison or fine summarily. In *Bloom v. Illinois,* 391 U.S. 194, 202, 88 S.Ct. 1477, 1482, 20 L.Ed.2d 522 (1968), the Supreme Court stated:

> The court has long recognized the potential for abuse in exercising the summary power to imprison for contempt—it is an "arbitrary" power which is "liable to abuse." *Ex parte Terry,* 128 U.S. 289, 313, 9 S.Ct. 77, 82, 32 L.Ed. 405 (1888). "[I]ts exercise is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions." *Cooke v. United States,* 267 U.S. 517, 539, 45 S.Ct. 390, 396, 69 L.Ed. 767 (1925).

(Footnote omitted.)

Although the *Bloom* case dealt with the power of criminal contempt, it was the summary nature of the infliction of punishment, no different than that allowed for civil con-

tempts, that concerned the Court. The fact that the power is so onerous is evidenced by the various statutes enacted by Congress to impose limits on the exercise of that power by the federal courts. Indeed, Congress has limited the exercise of its own powers of contempt by delegating that power in certain instances to the federal courts. *See* 2 U.S.C. § 194. It is not conceivable that such an onerous power could be vested in a body other than a court of law, equity or admiralty.

In addition to the foregoing consideration, the Court believes there are two other fundamental reasons for finding that the contempt power may not be vested in a court which is not endowed with the judicial power under Article III. They are: (1) the recognition by the Supreme Court that "inherently judicial powers" cannot be vested in non-Article III courts, and (2) that the policy reasons behind Article III would be subverted by vesting the contempt power in a non-Article III court.

In deciding whether certain matters can be determined by non-Article III courts, the Supreme Court has relied on the test of whether the matter in question is "inherently judicial." *Glidden Co. v. Zdanok,* 370 U.S. 530, 548-49, 82 S.Ct. 1459, 1471-72, 8 L.Ed.2d 671 (1962); *Ex parte Bakelite Corp.,* 279 U.S. 438, 458, 49 S.Ct. 411, 416, 73 L.Ed. 789 (1929); *Murray's Leasee v. Hoboken Land & Development Co.,* 59 U.S. (18 How.) 272, 280-82, 15 L.Ed. 372 (1856). *See also* Note, *Article III Limits on Article I Courts; The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act,* 80 Colum.L.Rev. 560, 574-76 (1980) [hereinafter cited as "Note, Article III Limits"]. These cases stand for the proposition that if a matter was

traditionally resolved by courts of common law or equity, the matter is inherently judicial. This Court finds the determination and punishment of contempt to be matters traditionally "resolved" by those courts, the limited *constitutional* power of contempt possessed by the legislative branch notwithstanding. The Court in *Kilbourn v. Thompson* found no basis in the law of England for the proposition that the general power of contempt was a traditional power of the legislative branch of government.

> We are of opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices. Nor, taking what has fallen from the English judges, and especially the later cases on which we have just commented, is much aid given to the doctrine, that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation.

Kilbourn, 103 U.S. at 189. The *Kilbourn* Court, in recognizing that the contempt power had its origins in the judiciary, held that Congress had a limited power of contempt only because the Constitution permitted it. *See* discussion *supra.*

The nature of the contempt power as "inherent" in the judicial power was well characterized by Frankfurter and Landis in their early and important article on the contempt power:

> The particular aspect of "inherent power" of the inferior Federal courts with which we are dealing concerns their incidental capacity to remove obstructions to the discharge of their work. The conventional de-

> scription of such obstruction is contempt, and the mode of dealing with it is characterized as the power of courts to punish for contempt. The fact of obstructions to courts is as old as English courts, and so also is the endeavor to remove them. But the ways and means by which this end was sought to be accomplished varied with variations in the nature of the obstruction. Likewise, the manner of removing obstructions was variously exercised by different courts and at different periods.

Frankfurther & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers,* 37 Harv.L.Rev. 1010, 1023 (1924) (footnote omitted).

Many other decisions have also recognized that the contempt power is inherent in the judicial power of the United States. *See* discussion, *supra,* particularly *In re Nevitt. See also Ex parte Terry,* 128 U.S. 289, 302-04, 9 S.Ct. 77, 78-79, 32 L.Ed. 405 (summarizing the early cases that stated the principle); *In re Chaplain,* 621 F.2d 1272, 1275 (4th Cir.1980) (the contempt power is "[i]nherent in federal judicial power"). It is true that the contempt power is frequently characterized by many of the cases as "inherent" in all courts and, despite Congressional limitations placed upon it, is deemed to be vested in those courts upon their creation. But to find that the contempt power is vested in *all* courts at their inception, including the bankruptcy court under the 1978 Code, is to forget that the contempt power, like all powers of the federal courts, cannot be inherited from thin air, but must flow from the Constitution. The contempt power may be "inherent," but it inheres from the judicial power of the United States and no other source. It can be vested, as

part of the judicial power, in only those courts capable of receiving it. The bankruptcy court is not so capable.

There is another, and perhaps more compelling, reason for finding that the contempt power is one not properly vested in the bankruptcy court. To allow that court to exercise this judicial power would seriously undermine the policies upon which Article III is grounded. *See* Note, *Article III Limits, supra,* at 561.

Article III and its tenure and salary provisions were created in the separation of powers scheme to insure the independence and integrity of the federal judiciary, facilitate impartial decision-making, assure proper protection for individual rights, attract the most highly qualified persons to the bench, and insure public confidence in the federal courts. Furthermore, the tenure provisions promote judicial individualism by protecting judges from improper influences, sometimes disguised as discipline, from their colleagues. *See id.* at 583-84 and references therein. The bankruptcy judge, who at any given time chooses to use or not use the contempt power, is placed in the position of acting or not acting without the protections of the salary and tenure provisions of Article III, and therefore his conduct and the reasons for it may undermine the policies upon which these provisions are founded. The very existence of the bankruptcy court and the judge's job depends on the grace of the Congress. The judge himself is subject to the discipline of other judges. 28 U.S.C. § 153(b). His use of the contempt power can certainly be influenced by that fact alone. The instant case itself illustrates the point. The jailing of Mr. Cryts for contempt brought national publicity and media coverage. He

went to Congress on a number of occasions to plead his cause. His case became a political "hot potato." Although Judge Baker has responded directly to the challenge, it cannot be said that bankruptcy judges under these conditions could act with the same security and confidence as could an Article III judge.

But perhaps the most fundamental aspect of Article III is that it guarantees an individual a certain "judicial process": the right to have a controversy resolved or a punishment imposed by an Article III judge. Justice Douglas recognized the right with respect to the qualifications of Article I and Article III judges.

> In sum, judges who do not perform Article III functions, who do not enjoy *constitutional* tenure and whose salaries are not *constitutionally* protected against diminution during their term of office cannot be Article III judges.
>
> Judges who perform "judicial" functions on Article I courts do not adjudicate "cases" or "controversies" in the sense of Article III. They are not bound by the requirements of the Seventh Amendment concerning trial by jury.
>
> Judges who sit on Article I courts are chosen for administrative or allied skills, not for their qualifications to sit in cases involving the vast interests of life, liberty or property for whose protection the Bill of Rights and the other guarantees in the main body of the Constitution, including the ban on bills of attainder and *ex post facto* laws, were designed. Judges who might be confirmed for an Article I court might never pass muster for the onerous and life-or-death duties of Article III judges.

Glidden v. Zdanok, 370 U.S. at 606, 82 S.Ct. at 1502 (Douglas J., dissenting). This is not to say that non-Article III judges are incompetent. Quite the contrary is

true. They possess expertise in a well-defined area that in fact most Article III judges do not. But the contempt power involves decisions and considerations regarding fundamental rights of individuals under the law which lies within the expertise of the constitutionally protected Article III judge, not the bankruptcy judge.

Finally, this Court must consider the appealability of civil contempts. Not only is the bankruptcy judge unable to provide that attribute of expertise, which is part of the "judicial process" of Article III, but his decision to fine or imprison would be non-appealable as to a party in the bankruptcy proceeding until a final judgment or decree is entered in the case. In a bankruptcy case, that may take months. *Fox v. Capital Co.,* 299 U.S. 105, 107, 57 S.Ct. 57, 58, 81 L.Ed. 67 (1936) ("The rule is settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt"). *Accord Southern Railway Co. v. Lanham,* 403 F.2d 119, 124 (5th Cir.1968) ("Civil contempt is wholly remedial" serves only the purpose of a party litigant, and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by non-compliance"); *S.E.C. v. Naftalin* 460 F.2d 471, 475 (8th Cir 1972); *Drummond Co. v. District 20, United Mine Workers of America,* 598 F.2d 381, 383 (5th Cir.1979); *Halderman v. Pennhurst State School & Hospital,* 673 F.2d 628, 636 (3d Cir.1981). The courts have brushed some gloss on this general rule by construing certain contempt orders as final orders. *See Drummond Co.,* 598 F.2d at 383-84 (noting several decisions doing just that). The general rule, however, is still applicable.

But even assuming that the appellate review mechanism provides a suitable substitute for Article III safeguards, neither the Congress nor the courts can assume away the clear structural dictates imposed by the Constitution. The critical fact is that Congress cannot ignore specific Article III requirements by devising alternative means through which the litigrants' due process rights to have their interests decided by tenured Article III judges can be "protected." In short, Congress cannot replace an Article III constitutional safeguard with a statutorily based form of protection accorded only by appellate review. *See Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional,* 70 Ga.L.J. 297, 307 (1981) (mere fact that values sought to be protected by framers can be protected by other mechanisms does not give Congress license to "disregard the framers' specific requirements"). *See also* H.R.Rep. No. 95-595, 39 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6000 ("the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context").

In sum, to allow a bankruptcy judge the unlimited power of civil contempt authorized by the 1978 Code would undermine the very principles upon which Article III is based.

There are a number of loose ends this Court must address before concluding its analysis. The first is the fact that the Supreme Court authorized a very limited power of contempt for bankruptcy referees to impose fines of no more than $250 under Rule 920. Because Judge Baker did not rely on that Rule, and could not, in

imposing the fine he did, the issue of the propriety of that Rule and the power of the Supreme Court to confer such extremely limited contempt powers on referees is not before this Court. Therefore, the issue will not be addressed.

The trustee would also have this Court uphold the contempt provisions of the Bankruptcy Code by analogizing them to the contempt powers exercised by the territorial courts and the municipal courts of the District of Columbia. On its face, the analogy appears sound. The argument is as follows: if the basic premise is that the contempt power cannot be severed from the judicial power of the United States and can therefore be vested only in a court created pursuant to Article III, then by what authority has Congress vested the contempt power in the courts of the territories and the District of Columbia?

It is well settled, of course, that the territorial courts are created pursuant to Article IV, section 3 of the Constitution. *See, e.g. American Insurance Co. v. Canter,* 26 U.S. at 546. That provision provides in relevant part:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States....

It has been held that 18 U.S.C. § 401 and Fed.R.Crim.P. 42 apply to contempt proceedings in the District Court of Guam, an implicit recognition of the contempt power of that territorial court. *Phelan v. People of Territory of Guam,* 394 F.2d 293, 297 (9th Cir.1968). Nevertheless, neither that court nor any other court has ever expressly dealt with the question of congressional authority to vest the contempt power in these territorial courts.

What has been addressed, however, is the broader question of constitutional authority. Yet the cases from *Canter* to *Palmore* have done everything but present a clean constitutional rationale for the congressional power to create non-Article III courts. Furthermore, with respect to the territorial courts, serious doubts have been raised whether the concept of a "legislative court" remains viable today considering that the need for an independent Article III judiciary for the territories is certainly as great as it is for the states. As one commentator put it, the territorial judge should have some feeling of security to try cases impartially without being dependent on the Department of Justice for continued tenure. *See* C. Wright, The Law of Federal Courts, 37 (3d ed. 1976). Nevertheless, a review of the cases does point up a fundamental difference between the power of Congress to establish bankruptcy courts as adjuncts to the district courts for a very limited, specialized subject matter, and the power to establish courts of broad jurisdiction to resolve the myriad of legal issues arising in a territory. The key to that difference is found in the source of power from which Congress legislates for the territories. That power arises out of the authority of Congress to act in the capacity of a local legislative body apart from the usual confines of the Constitution. The seminal cases on the issue make the point clear.

Chief Justice Marshall in the *Canter* case identified the source of power from which the Congress could create the territorial courts and vest them with judicial power.

> The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by

> congress, in the execution of those general powers which that body possesses over the territories of the United States.... In legislating for them, congress exercises the combined powers of the general, *and of a state government.*

26 U.S. at 321 (emphasis added). In *Benner v. Porter,* 50 U.S. (9 How.) 235, 242, 13 L.Ed. 119 (1850), the Supreme Court made it even clearer that the territories and their courts were not subject even to the Constitution and its mandates absent a Congressional statement to the contrary.

> The distinction between the Federal and State jurisdictions, under the Constitution of the United States, has no foundation in these Territorial governments; and consequently, no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the Federal and State authorities. There is but one system of government, or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction.
>
> *They are not organized under the Constitution, nor subject to its complex distribution of the powers of government,* as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control.

Id. at 242 (emphasis added). *But see McAllister v. United States,* 141 U.S. 174, 11 S.Ct. 949, 35 L.Ed. 693 (1891) (indicating certain fundamental individual rights found in the Constitution might apply to the territories by inference). The plurality in the recent *Marathon* decision recognized that, in dealing with the territories and the

District of Columbia, Congress is vested with "a complete power of government." 102 S.Ct. at 286.

The situation in the District of Columbia is identical to that in the territories. Although the District Court and the Court of Appeals for the District of Columbia are now Article III courts, the Superior Court for the District of Columbia and the District of Columbia Court of Appeals are Article I courts. D.C.Code Ann. § 11-101. Congress has vested both the municipal courts with powers of contempt equal to those of the federal courts. D.C.Code Ann. 11-944, 11-741. But with respect to the District of Columbia, the Supreme Court long ago recognized that Congress legislates there in its capcity as a local legislature as well as a general one. In *Kendall v. United States,* 37 U.S. (12 Pet.) 522, 618, 9 L.Ed. 1181 (1838), the Court reviewed the congressional creation of non-Article III courts in the District and held that in the District of Columbia there was

> no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice.

More recently, the Supreme Court reaffirmed this view in *Palmore.* See 411 U.S. at 403, 93 S.Ct. at 1679. Thus, as with the territories, Congress acts as the local legislative body for the District of Columbia, although it has established local governments in both the District and territories as well.

In sum, the Congress vests the power of contempt in the territorial courts and municipal courts of the District of Columbia by virtue of its authority as the "complete government" for those areas. Although its initial grant of authority to deal with the territories and the District of Columbia comes from the Constitution, the Constitution does not thereafter bind Congress when it puts on the hat of a local legislative body and parcels out various functions to branches of the local government it creates. The courts created for the territories and the District of Columbia, then, lie entirely outside the states of the federal union, unlike the bankruptcy courts. *See Marathon,* 102 S.Ct. at 2871 ("The courts created by the Bankruptcy Act of 1978 do not lie exclusively outside the States of the Federal Union, like those in the District of Columbia and the territories"). It might even be said that the power conferred upon the territorial and the District of Columbia municipal courts is the "judicial power of the territory" rather than the "judicial power of the United States." The contempt power exercised by these courts is clearly an attribute of the territorial judicial power that Congress has the exclusive right to vest, in whatever form it chooses, because that judicial power does not arise from Article III, but from the power of Congress to act as a local legislature to establish a complete system of government for these areas. Congress has no such broad power with respect to the bankruptcy courts. They are a federal subject matter and a very narrow and specialized one at that. To vest them with the contempt power requires the constitutional authority of Article III, which those courts do not have as their foundation for existence.

The trustee points out that Congress has authorized the Tax Court, an Article I court, to fine or imprison for contempt under the exact circumstances as the district and appellate courts may. *See* 26 U.S.C. § 7456(d). The constitutionality of that provision is not before this Court. Nevertheless, this Court notes that prior to the enactment of that provision in 1969, it was held that the Tax Court did not have any inherent power of contempt. *MacRae v. Riddle,* 350 F.2d 291, 292 (9th Cir.1965). The constitutionality of 26 U.S.C. § 7456(d) has never been directly raised. Apparently, only two courts have ever made mention of it, both in dicta. *Continental Equities, Inc. v. Commissioner of Internal Revenue,* 551 F.2d 74, 83 (5th Cir.1977); *Ryan v. Commissioner of Internal Revenue,* 517 F.2d 13, 19 (7th Cir.), cert. denied, 423 U.S. 892, 96 S.Ct. 190, 46 L.Ed.2d 124 (1975). Therefore, this Court finds the precedential value of these cases unpersuasive. At the very least, the constitutionality of the contempt power of the Tax Court appears to be in serious doubt.

This Court does note, however, that if the bankruptcy court is an adjunct to the federal district court, there is precedent for limiting its power of contempt to certifying the facts of contemptuous conduct to the district court judge, who may then enter the appropriate order. Such is required of federal magistrates, they having no power of contempt themselves. 28 U.S.C. 636(e). The Court also notes that in the Court of Claims structure, the "court"—which is an Article III court—functions as an "appellate court," the judges of which have the contempt power, while designated "trial judges" do the actual fact finding and initial decision-making. *See* U.S.Ct.Cl.Rule 8, 28 U.S.C.A.

Those "trial judges" do not have contempt powers but must certify facts to the "appellate court" (i.e. Article III judges) for appropriate contempt orders to issue. *See* U.S.Ct.Cl.Rule 13(e), 28 U.S.C.A. Certainly the relationship between the bankruptcy court and the district court is not altogether different from this.

This Court also notes that the Congress itself was concerned with the constitutional problems of vesting the contempt power in the bankruptcy court under the 1978 Code. The Senate version of the Code would have limited the power to maximum fines of $1,000 with no power to imprison. *See* S.Rep. No. 95-989, 95th Cong., 2nd Sess. p. 148 (1978). The House was concerned that the power could not be vested in the bankruptcy court unless it was constituted as an Article III court. *See* H.Rep. No. 95-595, 95th Cong., 1st Sess. p. 38 (1977). Chairman Rodino of the House Committee on the Judiciary even went so far as to draft a letter which was sent to a number of constitutional scholars. Part of that letter, which addressed the constitutionality of the proposed bankruptcy code as a whole, specifically dealt with the contempt power. *Id.* at 64. The letters in response which mentioned the contempt power problem indicated clear concern as to whether the criminal contempt power could be conferred on the new court, while some letters indicated that vesting of civil contempt powers would also be unwise. *See id.* at 78 (Prof. Mishkin), 81 (Prof. Sandalow), 84 (Prof. Shapario), 86 (Prof. Wechsler), and 87 (Prof. Wright).

Finally, this Court must address appellant's theory that as a result of the Supreme Court decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, — U.S. —, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), the con-

tempt provisions of the 1978 Code are unconstitutional. Although the *Marathon* decision is not controlling in this case because of its prospective application (see *infra*), the analysis and conclusions made by the Court are instructive in resolving the contempt power issue. In *Marathon* the plaintiff had filed a bankruptcy petition in the United States Bankruptcy Court for the District of Minnesota. Shortly thereafter, it filed in that same court a suit against the defendant seeking damages for alleged breaches of contract and warranty, claiming the suit was related to the bankruptcy proceeding. Defendant contested the jurisdiction of the bankruptcy court to hear the contract and warranty claims. A four-Justice plurality found the statute granting jurisdiction to the bankruptcy courts, 28 U.S.C. § 1471, to be an unconstitutional delegation of Article III power to a non-Article III court. Title 28 U.S.C. § 1471 states in relevant part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or related to cases under title 11.
>
> (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

Two Justices concurred with the judgment, but only to the extent that the particular claim at issue was one not adjudicable by a bankruptcy court. But because the imper-

missible grant of authority was not severable from the remaining grant of authority to the bankruptcy courts, the concurrers agreed with the plurality in finding the entire jurisdictional statute unconstitutional. 102 S.Ct. at 2880-82.

The plurality opinion would appear to be limited by Justice Rehnquist's concurrence. He found that the impermissible aspect of the statute was the broad grant of jurisdiction accorded the bankruptcy courts which allows them to hear suits that "are the stuff of the traditional actions at common law" or "arise entirely under state law." *Id.* at 2881. The civil contempt power would not appear to fall precisely within either of those classifications. Nevertheless, this Court believes that *Marathon* stands for the more fundamental proposition that *any* proceeding "arising in or related to" bankruptcy matters, which proceeding traditionally had to be resolved through the exercise of the judicial power of the United States, cannot be resolved by a court of bankruptcy. The power to sanction for civil contempt is clearly such a proceeding, and usually a summary one at that.

The plurality opinion in *Marathon,* though it spoke in terms of jurisdictional grants to the bankruptcy court, was clearly describing impermissible grants of judicial power, that is, the jurisdiction to exercise certain judicial powers.

> [T]he bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials, 28 U.S.C. § 1480 (1976 ed., Supp. III), the power to issue declaratory judgments, § 2201, the power to issue writs of habeas corpus, § 2256, and the power to issue any order, process or judgment appropriate for the enforcement of the provisions of title 11, 11 U.S.C. § 105(a) (1976 ed., Supp. III), [footnoting 28 U.S.C. § 1481.]

Marathon, 102 S.Ct. at 2879. To the plurality, these grants of power, along with others previously addressed, were unconstitutional.

> We conclude that § 241(a) of the Bankruptcy Act of 1978 has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.

Id. at 2879-80.

It is noteworthy that the *Marathon* court viewed the contempt power as an "essential attribute of the judicial power." This Court believes that, had the issue been before it, the Supreme Court would have found the broad grant of contempt power under the 1978 Code to be unconstitutional.

[7] In the final analysis, this Court concludes the contempt powers of the bankruptcy judge, implied under 28 U.S.C. § 1481 and 11 U.S.C. § 105, constitute an unconconstitutional grant of judicial power. In this case, under the findings of the bankruptcy judge, there is no doubt that the soybeans taken by Wayne Cryts were the property of the trustee and that the taking was wrongful. Nevertheless, Judge Baker did not have the authority to punish Mr. Cryts for contempt as he did. The grant of that power by the Congress was unconstitutional.

To summarize, the contempt power is an attribute of the judicial power of Article III and cannot be vested in a non-Article III court because the "judicial power of the United States" cannot be vested in such a court. Those cases which referred to the inherent power of contempt

in a bankruptcy court in fact referred to the power of the *district court* constituted as the bankruptcy court and as the repository of bankruptcy jurisdiction. The broad power to punish for contempt is "inherently judicial" and therefore not delegable by Congress to a non-Article III court. Allowing the bankruptcy court to exercise this fundamental Article III power would undermine the very premises underlying that Article of our Constitution. Broad contempt powers are an exclusive Article III prerogative. Their exercise has a fundamental impact on the rights of citizens. They are often exercised in a summary fashion with minimal due process and procedural protections. Such power is constitutionally vested in Article III courts. It cannot be vested by legislative fiat in non-Article III courts.

Finally, the bankruptcy court is not without means to enforce its orders or insure its dignity. It can certify facts of contemptuous conduct to the district court for a prompt and appropriate order. Given the awesome power of contempt, this is "the least possible power adequate to the end proposed" as required by *Anderson v. Dunn*, 19 U.S. at 230.

Constitutionality of the Code.

As his final argument, appellant contends that, in light of *Marathon,* the bankruptcy court lacked jurisdiction over the entire matter. Without analyzing the ramifications of the decision and the effect of the stay the Supreme Court imposed on its judgment, this Court simply refers appellant to Section V of the opinion, which states that: "our decision today shall apply only prospectively." *Marathon,* 102 S.Ct. at 2880.

* * *